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FILE COPY

OCTOBER TERM, 1907

No. [REDACTED] 13 Original

STATE OF CALIFORNIA,

Complainant

vs.

MURRAY W. LATIMER, JAMES A. DAILEY and LEE M. EDDY, individually and as members of the Railroad Retirement Board, and GUY T. HILL, VERBING, individually and as Agents of Internal Revenue,

Defendants.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

BILL OF COMPLAINT

THE STATE OF CALIFORNIA,

By [REDACTED]

Attorney for Complainant

THE STATE OF CALIFORNIA,

By [REDACTED]

Attorney for Defendants

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In the Supreme Court

OF THE

UNITED STATES

OCTOBER TERM, 1937

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STATE OF CALIFORNIA,

Complainant,

vs.

MURRAY W. LATIMER, JAMES A.
DAILEY and LEE M. EDDY, individ-
ually and as members of the Railroad
Retirement Board, and GUY T. HEL-
VERING, individually and as Commis-
sioner of Internal Revenue,

Defendants.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

Now comes the complainant, the State of California, by its Attorney General, U. S. Webb, and presents herewith its Bill of Complaint in the above entitled cause and respectfully moves this Court

for leave to file the same in this Court under its original jurisdiction.

STATE OF CALIFORNIA,

By U. S. WEBB,

Attorney General,

H. H. LINNEY,

Deputy Attorney General,

LUCAS E. KILKENNY,

Deputy Attorney General,

JAMES J. ARDITTO,

Deputy Attorney General,

Attorneys for Complainant.

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Retirement Board, and GUY T. HEL-
VERING, individually and as Commis-
sioner of Internal Revenue,

Defendants.

NOTICE OF HEARING

Please take notice that on the 4th day of April, 1938, or as soon thereafter as counsel can be heard, the motion of complainant for leave to file its bill of complaint in the above entitled cause will be

submitted to the Supreme Court of the United States.

STATE OF CALIFORNIA,
By U. S. WEBB,
Attorney General,

H. H. LINNEY,
Deputy Attorney General,

LUCAS E. KILKENNY,
Deputy Attorney General,

JAMES J. ARDITTO,
Deputy Attorney General,
Attorneys for Complainant.

PROOF OF SERVICE

We hereby acknowledge receipt of ~~copy~~ of motion for leave to file bill of complaint, bill of complaint, brief ~~and~~ notice of hearing this ----- day of April, 1938.

Attorneys for Defendants.

In the Supreme Court

OF THE
UNITED STATES

OCTOBER TERM, 1937

No. _____ Original

STATE OF CALIFORNIA,
Complainant,

vs.

MURRAY W. LATIMER, JAMES A.
DAILEY and LEE M. EDDY, individ-
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Retirement Board, and GUY T. HEL-
VERING, individually and as Commis-
sioner of Internal Revenue,
Defendants.

BRIEF ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

As cause for this motion it is respectfully shown:

1. That this cause involves a controversy be-
tween the State of California and citizens of other
states.

2. That the State of California is the real party in interest as complainant.

3. That it is not a suit to enforce a penalty under the state law and the nature of the controversy does not call for a judgment on a political or governmental question.

4. That no service of process can be had within the State of California upon any of the defendants.

5. That this cause is of a justiciable character, of a civil nature, is within the judicial power of the United States, is instituted to redress a wrong and save the State of California from irreparable injury as a sovereign state, and to save its duly constituted state officers from irreparable injury resulting from certain threatened acts on the part of defendants which are in conflict with the rights of the State of California under the Constitution of the United States.

6. That this is an action arising from extraordinary and exceptional circumstances in which the State of California and its officers and employees would be without adequate relief except by invoking the original jurisdiction of this Court in equity as set forth in complainant's bill of complaint.

7. Equity jurisdiction rests upon the claim that to apply to the State of California the provisions of the Railroad Retirement Act of 1935, the Railroad Retirement Act of 1937 or the Carriers' Taxing Act of 1937 would be unconstitutional and

would irreparably injure said state in its property rights and in the exercise of its governmental and sovereign powers as a state, and would give rise to a multiplicity of suits as more particularly set forth in Paragraph XI of said Bill of Complaint.

8. That this is not an action against the United States but is an action to enjoin defendants from committing acts under color of office which are neither authorized by the statutes of the United States nor by its Constitution.

Ohio vs. Helvering, 292 U. S. 360;

Hill vs. Wallace, 259 U. S. 44;

Philadelphia Co. vs. Stimson, 223 U. S. 605;

Pennoyer vs. McConnaughy, 140 U. S. 1.

Wherefore, complainant prays that this honorable court may exercise its original jurisdiction in this controversy as provided in Article III, section 2, clause 2 of the Constitution of the United States.

STATE OF CALIFORNIA,

By U. S. WEBB,

Attorney General of the
State of California,

H. H. LINNEY,

Deputy Attorney General,

LUCAS E. KILKENNY,

Deputy Attorney General,

JAMES J. ARDITTO,

Deputy Attorney General,

Attorneys for Complainant.

In the Supreme Court

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VERING, individually and as Commis-
sioner of Internal Revenue,

Defendants.

BILL OF COMPLAINT

*To the Honorable, the Chief Justice and Associate
Justices of the Supreme Court of the United
States:*

The bill of complaint of the State of California
respectfully shows this Honorable Court that:

I

The State of California is one of the states of the United States of America, and this suit is brought on its behalf pursuant to the written request made on the Attorney General of the State of California by the Board of State Harbor Commissioners for San Francisco Harbor, a duly constituted agency of the State Government; and U. S. Webb is the duly elected, qualified and acting Attorney General of the State of California.

II

Defendants Murray W. Latimer, James A. Dailey and Lee M. Eddy are the duly appointed, qualified and acting members of and constitute the Railroad Retirement Board, an independent agency in the executive branch of the Government of the United States, having its principal office in the District of Columbia, and each of said persons is sued herein individually and as a member of said Board; said defendant Murray W. Latimer is a citizen of the State of New York; that said defendant James A. Dailey is a citizen of the State of New York; that said defendant Lee M. Eddy is a citizen of the State of Missouri.

Defendant Guy T. Helvering is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, and has his official residence and is to be found in the District of Columbia, and is a citizen of the State of Kansas.

III

This suit is brought in the Supreme Court of the United States in the exercise of the original jurisdiction of said Court, on the ground that it is a suit in equity relating to a controversy between a state and citizens of other states of the United States.

IV

The State Belt Railroad is owned by complainant and is located on the waterfront of the City and County of San Francisco, State of California, upon real property owned by complainant. The said State Belt Railroad is located wholly within the City and County of San Francisco in the State of California and extends practically the full length of the Embarcadero and Jefferson Street to the Presidio of San Francisco, a United States Military Reservation, a distance of approximately five miles. It has a physical connection with the tracks of the Southern Pacific Company near the Embarcadero and Townsend Street, San Francisco. Its tracks also run onto forty-five wharves owned by the State of California and used by freight car ferries of the Southern Pacific Company, The Atchison, Topeka & Santa Fe Railway Company, the Northwestern Pacific Railway Company, and The Western Pacific Railway Company, all common carriers engaged in interstate commerce by railroad, and connect with certain freight yards of the four inter-

state carriers mentioned, in which all switching is done by the said State Belt Railroad. These yards are owned by the State of California and by agreement are used by the interstate carriers mentioned. On the forty-five wharves owned by the State of California freight is loaded onto steamers from cars hauled by the State Belt Railroad and is unloaded from steamers onto cars hauled by said State Belt Railroad. In addition, said State Belt Railroad serves about one hundred and seventy-five industries located along its line, and with which it has connections. Said State Belt Railroad also moves carload freight and empty cars for loading from and onto the Southern Pacific transfer tracks, such movements being for the limited purpose only of interchanging cars, these transfer tracks being for the use of shippers or consignees who do not have industrial or private tracks of their own, and are owned and operated by the Southern Pacific Company, but by agreement the State Belt Railroad has trackage rights over them for the limited purpose of interchanging cars, as above stated.

None of the tracks of the State Belt Railroad is ever used by any of the other carrier roads except for the limited purpose of interchanging cars, and no locomotives except those of the State Belt Railroad ever move over any part thereof, and the State of California owns no cars.

The State Belt Railroad is not an incorporated company or agency of the State of California. Its name was adopted by the Board of State Harbor Commissioners for San Francisco Harbor merely to designate it as one of the many diversified governmental instrumentalities of said board used in connection with the exercise of said board's powers.

Said State Belt Railroad is operated by the State of California for the purpose of facilitating the commerce of the port of San Francisco without any profit being derived therefrom. The charges made for services rendered by it are fixed by said board pursuant to the authority conferred upon it by sections 1690 to 3231, inclusive, of Part I, Division VI, of the Harbors and Navigation Code of the State of California, attached hereto, marked Exhibit "C," and made a part hereof.

The operation of said State Belt Railroad is considered necessary by the State of California in the interest of and for the benefit of its people in the promotion and facilitation of commerce through the port of San Francisco and is operated solely for that purpose.

Said State Belt Railroad has been in operation for about forty-five years under the immediate supervision of various superintendents. Said superintendents are appointed by said Board of State Harbor Commissioners and are under its general supervision and control and hold office at the pleasure of said board. All persons employed

in the operation of said State Belt Railroad are officers and employees of the State of California. All of said employees are selected and appointed under a merit system provided for by Article XXIV of the Constitution of said state and by the State Civil Service Act (Cal. Statutes 1937, page 2085), and after a period of probation have permanency of tenure and are removable only for cause, as provided by said act.

Said State Belt Railroad is an essential and indispensable facility of the San Francisco Harbor, administered by the State of California by and through the Board of State Harbor Commissioners for San Francisco Harbor, and said state in the construction, maintenance, operation, management and control of said State Belt Railroad is engaged in a usual, traditional and essential governmental function.

V

The said State Belt Railroad hereinabove referred to and described in Paragraph IV of this complaint is operated by and through the Board of State Harbor Commissioners for San Francisco Harbor, composed of three commissioners appointed by the Governor of the State of California by and with the consent of the senate of said state, and holding office at the pleasure of the Governor. Said board has jurisdiction, control and administration of the waterfront property upon which said State Belt Railroad is located, and

operates said railroad as one of the facilities of San Francisco Harbor.

Said Board of State Harbor Commissioners for San Francisco Harbor is, and said board and its predecessors have been since about the year 1863, an agency of said State of California created by law and vested by law with jurisdiction and control over said waterfront property and over that portion of the Bay of San Francisco within an area defined by law and lying generally along the easterly and northerly harbor lines of the City and County of San Francisco, and the improvements, rights, privileges, easements, and appurtenances connected therewith, said jurisdiction and control being for the purpose of maintaining and developing the San Francisco Harbor and maintaining, developing and operating the harbor and terminal facilities thereof, including the State Belt Railroad.

Said Board of State Harbor Commissioners for San Francisco Harbor has the duties and powers set forth and prescribed by the Statutes of the State of California which are codified in sections 1690 to 3231, inclusive, of Part I, Division VI, of the Harbors and Navigation Code of the State of California, hereinabove referred to and marked Exhibit "C."

All of the powers and duties of said Board of State Harbor Commissioners for San Francisco Harbor, including its powers and duties relating to the construction, maintenance and operation of the

State Belt Railroad, are essentially governmental in character and such as are usually and traditionally a part of government functioning, and are directed to the general welfare of the people of the State of California in that only through the instrumentality of such state agency can the San Francisco Harbor be prepared, organized, maintained, developed and operated, and the commerce of the Port of San Francisco with all parts of the world and with the inland rivers and valleys of the State of California promoted for the best interest and general welfare of the people of the State of California.

VI

All of said employees of said State Belt Railroad now are, and prior to and ever since the enactment of the Railroad Retirement Act of 1935 hereinafter more particularly referred to many of said employees were members of the State Employees' Retirement System of the State of California, created and existing under the terms of the State Employees' Retirement Law (California Statutes 1931, page 1442, as amended), hereto attached and marked "Exhibit D" and made a part hereof.

Said act provides for a pension system for state employees of the State of California; makes officers and employees of the state, with certain exceptions not pertinent herein, members of said system; provides for monthly deductions, at specified rates, from the compensation of such members, and for

the payment of such deductions into the "state employees' retirement fund," created by said act. Said act also provides for the payment into the "state employees' retirement fund" from the state funds from which members are compensated, including the San Francisco Harbor Improvement Fund, of 3.75 per cent of the total compensation of members of the system who are paid from such funds. All such moneys paid into the "state employees' retirement fund" are, under the provisions of said act, used for the payment of service retirement allowances, disability retirement allowances, and death benefits to members of the system, who become eligible therefor.

Sections 29 and 38b of said act, considered together, provide that persons who are members of any retirement or pension system supported wholly or in part by funds of the United States Government and who are receiving credit in such other system for service shall not be members of said state retirement system of California, it being the purpose of these sections to prevent any person from receiving credit for the same service in two retirement systems supported wholly or in part by public funds.

Under the provisions of section 38b and section 75 of the act any member of the state retirement system, who on account of his employment by the state is required to become a member of a retirement system supported wholly or in part by funds of the

United States, is entitled to the repayment to him of his contributions to the state employee's retirement fund.

VII

That the Railroad Retirement Act of 1935 (Act of Congress of August 29, 1935, Chapter 812, 49 Stat. 967, 45 U. S. Code, Secs. 215-228), hereinafter referred to as the Railroad Retirement Act of 1935, the Railroad Retirement Act of 1937 (Act of Congress of June 24, 1937, Chapter 382, 50 Stat. 307, 45 U. S. Code, Secs. 228a-228r), hereinafter referred to as the Railroad Retirement Act of 1937, and the Carriers' Taxing Act of 1937 (Act of Congress of June 29, 1937, Chapter 405, 50 Stat. 435, 45 U. S. Code, Secs. 261-273), hereinafter referred to as the Carriers' Taxing Act of 1937, each, by their terms, purport to apply to all carriers, subject to Part I of the Interstate Commerce Act, which operate any equipment or facility or perform any service in connection with transportation by railroad.

The purpose and effect of the Railroad Retirement Act of 1935 and of the Railroad Retirement Act of 1937 is to disburse funds of the Government of the United States to "employees," as defined in said acts, eligible for "annuities" under said acts, and who conform to all the provisions of said acts relating to application and qualification therefor.

The purpose and effect of the Carriers' Taxing Act of 1937 is to furnish from the proceeds of an

income tax on the compensation of "employees," and from an income tax on the compensation of "employee representatives," and from an excise tax on "employers," sufficient funds wherewith to pay the "annuities" provided for by the Railroad Retirement Act of 1935, and by the Railroad Retirement Act of 1937.

On the face of the Railroad Retirement Act of 1935 and the Railroad Retirement Act of 1937 and the Carriers' Taxing Act of 1937, each of said acts is related to each of the other acts textually; in field of operation and application; by their respective relation of burdens and benefits to the same classes, bases, and measures; by provisions which are baseless and inexplicable on the face of each act standing alone, and explainable only by corresponding provisions of each of the other acts; by their respective references to amendments of the Social Security Act; and by their combined substantial identity with the unconstitutional Railroad Retirement Act of 1934; all of which is confirmed by their legislative history. Said acts are the coordinated, complementary and interdependent parts of, and together they constitute, under the separate exercise of the taxing power and of the power of appropriation, a single legislative scheme to establish a railroad pension system under which carriers are compelled to contribute large sums of money, and a group of persons consisting of all present and future carrier employees and certain

others are compelled to contribute substantial amounts, whether they so desire or not, for the procurement of "annuities" as provided in said Railroad Retirement Acts. The pension system so provided for will not be effective unless all of such acts are enforced.

If said acts are applied to the State Belt Railroad, the State of California, as owner of said railroad, will be compelled to pay out of the treasury of said state to the internal revenue officers of the United States approximately \$7,862.32 yearly, as and for an income tax on the employees of said railroad, which said state will be obliged to collect from said employees, and an excise tax upon the State of California in the amount of \$7,862.32 yearly.

If said acts are so applied, the employees of said State Belt Railroad who were such employees on the enactment date of the Railroad Retirement Act of 1937, or who became or shall become such employees after said date, will become eligible for annuities, as provided in said act, after they have ceased to render compensated service (except as otherwise provided in said act) to any person whether or not an employer as defined in section 1a of said act, and death benefits will be paid with respect to the death of individuals who are such employees after December 1, 1936, and all such employees will cease to be members of the State Employees' Retirement System of California by

reason of the provisions of section 38b of the State Employees' Retirement Law (1931 Cal. Stats., page 1442, as amended), hereinabove in Article VI of this bill of complaint referred to.

VIII

The Railroad Retirement Act of 1935, the Railroad Retirement Act of 1937, and the Carriers' Taxing Act of 1937, on account of their interrelationship and substantial singleness of purpose, constitute one legislative enactment having for its sole purpose the establishment and operation of a pension system and the provision of funds to supply "annuities" and disability and death benefits to the members of such system. No part of this legislative enactment can be operative as to complainant without imposing upon complainant the taxes provided for in the Carriers' Taxing Act of 1937. Such taxes can not be imposed upon complainant, State of California, or upon the State Belt Railroad without violating the fundamental implied constitutional doctrine of the reciprocal immunity from taxation of the governmental functions, agencies and instrumentalities of the states and the United States, respectively. To pay the taxes so unlawfully demanded by defendant Guy T. Helvering would be a burden on and an interference with the sovereign independence of complainant in its governmental capacity. In attempting to collect any of such taxes from complainant or to enforce against complainant

the Carriers' Taxing Act of 1937 or the Railroad Retirement Act of 1935 or the Railroad Retirement Act of 1937; which said railroad retirement acts are so connected and related to the first named act by text, interdependence, reference, and singleness of purpose as to constitute with it a single legislative enactment, the defendants and any persons acting under them would be acting illegally and unconstitutionally and outside the scope of their official authority. Any such action would be the illegal and unconstitutional action of the defendants individually and would be without the authority of the United States, and would not be an action of the United States.

IX

As hereinafter more particularly set out, defendants Murray W. Latimer, James A. Dailey and Lee M. Eddy, purporting to act as members of the Railroad Retirement Board, hereinbefore referred to in Paragraph II hereof, have notified complainant in writing that the Railroad Retirement Act of 1935 and the Railroad Retirement Act of 1937 apply to the said State Belt Railroad and to its owner and operator, State of California, complainant herein; that a copy of said notice is attached hereto, marked Exhibit "A," and made a part hereof.

That defendants Murray W. Latimer, James A. Dailey and Lee M. Eddy, purporting to act as members of the Railroad Retirement Board, have threatened to and unless enjoined by this Court will re-

quire the complainant through its duly constituted agent, the Board of State Harbor Commissioners for San Francisco Harbor, to gather and keep records of the employees of complainant on said State Belt Railroad and will enforce against the complainant, its officers, agents, and employees certain penalties if it refuses to gather and keep such records.

X

Defendant Guy T. Helvering, purporting to act as Commissioner of Internal Revenue, has notified complainant in writing that the Carriers' Taxing Act of 1937 applies to said State Belt Railroad and to its owner and operator, the State of California, complainant herein; that a copy of said writing is attached hereto, marked Exhibit "B," and made a part hereof.

Defendant Guy T. Helvering, purporting to act as Commissioner of Internal Revenue, has threatened to and unless enjoined by this Court will enforce collections of alleged taxes pursuant to the Carriers' Taxing Act of 1937 from complainant State of California, as owner of the State Belt Railroad; said defendant also will enforce against the complainant, its agents, and employees certain penalties for nonpayment of said taxes alleged to be due.

Said defendant Guy T. Helvering, purporting to act as Commissioner of Internal Revenue, has threatened to and unless enjoined by this Court

will force the complainant to deduct from the compensation of its employees the income tax claimed by said defendant to be levied upon the income of said employees, at the rates prescribed by the Carriers' Taxing Act of 1937, and will enforce against complainant, its officers, agents, and employees certain penalties for the failure to make such deductions.

XI

As grounds for the exercise of original jurisdiction in equity in this Court and for the equitable relief herein sought complainant avers:

The threatened attempt of defendant Guy T. Helvering, purporting to act as Commissioner of Internal Revenue, to collect the taxes unlawfully demanded by him from the State of California would, if complainant should refuse to pay the taxes unlawfully sought to be imposed upon it or to deduct or pay over the tax unlawfully levied upon the income of its said employees, subject complainant and its officers and employees to heavy penalties, as follows: (a) For wilful failure to pay the tax or to keep any records or supply information, complainant would be subject to prosecution for commission of a misdemeanor and the imposition of a fine of \$10,000. (Sec. 7(c) Carriers' Taxing Act of 1937 and Revenue Act of 1926, Secs. 600, 800, and 1114a); (b) For wilful failure to deduct and pay over the income tax im-

posed on the compensation of employees, complainant would be subject to prosecution for commission of a felony and the imposition of a maximum fine of \$10,000. (Sec. 3a, Sec. 7c Carriers' Taxing Act of 1937 and Revenue Act of 1926, Secs. 600, 800, and 1114b); (c) For failure to pay the alleged tax when due there would be added to any tax imposed by the Carriers' Taxing Act of 1937 interest at the rate of 7 per cent per annum on the amount of said tax (Sec. 7b, Carriers' Taxing Act of 1937); (d) Complainant and its officers would also be liable to indictment, fine and imprisonment under federal conspiracy statutes.

Complainant and its officers can avoid these penalties only by paying the taxes unlawfully sought to be imposed upon complainant and upon the income of its employees and suffering irreparable damage hereafter shown unless this court of equity takes jurisdiction and grants injunction against collection of such taxes.

If complainant is forced to make payment under said act of such taxes for any of the periods fixed by regulations prepared and issued by said defendant, governing the manner and conditions of making returns of taxes and payment and collection of taxes under the Carriers' Taxing Act of 1937, or at any time after the termination of such periods (first period ended September 30, 1937), the only remedy available to complainant will be,

immediately after payment, to file with the Commissioner of Internal Revenue a formal claim for refund. Complainant can file no suit on such claim until the commissioner acts thereon, unless the commissioner fails to act within six months (Sec. 3226 R. S. as amended by Section 1103, Revenue Act 1932).

The early determination of the applicability of the said acts to complainant and to its employees will be for the benefit of all parties in interest, including not only complainant but also the United States. Such determination will disclose to defendants whether they are proceeding under authority of law, and will protect complainant from irreparable damage. Such determination will prevent large disbursements of funds derived from the Carriers' Taxing Act of 1937, which will be repayable to complainant but not recoverable by the government, in case said acts are later determined by the courts to have no application to complainant or its employees, and will also, in case said acts are later determined to have no application to complainant or its employees, prevent irreparable loss to complainant resulting from multiplicity of claims and suits by the employees of said State Belt Railroad to establish their rights to civil service status under the laws of the State of California, and their rights and privileges under the State Employees' Retirement System of said state, which rights and privileges will have been

surrendered by them in reliance upon the Railroad Retirement Act of 1937.

The Carriers' Taxing Act of 1937, if applied to complainant, will impose upon complainant as an "employer" a very heavy tax with respect to having individuals in its employ, to wit: an amount of \$7,862.32 per year. This amount, if imposed and collected, must be supplied from charges collected by complainant in the administration of San Francisco Harbor, an essential, usual and traditional governmental function. The charges necessary to supply such amount would be in addition to those now imposed by the Board of State Harbor Commissioners for San Francisco Harbor. Such charges would be a burden upon the commerce of said harbor. In order to make such charges the tariffs of said board would have to be revised and the uncertainty of the legality of such increased charges would work great harm to complainant and to the public. The interests of all concerned demand a speedy determination of the applicability of said acts to complainant and incidentally to its employees, and the fact that a remedy at law will delay such determination for a much longer time makes that remedy inadequate and gives equity jurisdiction.

The remedy at law afforded by quarterly payment of taxes, claims for refund, and suits by complainant for refund of taxes will result in a multiplicity of suits by complainant, and a multiplicity of suits

to be defended by the Government of the United States and its officers.

The aforesaid threatened attempt of defendant Guy T. Helvering, purporting to act as Commissioner of Internal Revenue, to force the complainant to deduct the alleged income tax claimed by said defendant to be levied upon the income of the employees would, if complainant should deduct or pay over the tax unlawfully levied upon the income of its said employees, subject complainant to the harassment and expense of claims and demands and to a multiplicity of suits by its employees to recover the amounts so illegally deducted, which amounts will have been paid by complainant to the collecting agency of the United States unless the relief herein sought be granted.

Some of complainant's employees are casual laborers paid daily, many are paid semi-monthly, and many are paid monthly. The Carriers' Taxing Act of 1937 requires employers to collect the income tax levied upon the income of each employee by "deducting the amount of the tax from the compensation of the employee as and when paid." To comply with this requirement complainant will be compelled to set up an account on its books with each of its employees and make the deductions and entries representing the tax daily, semi-monthly, or monthly according to the period "as and when" the employee is paid. Additional entries on each indi-

vidual account will be necessary when payment is made to the collecting agency of the United States.

The aforesaid threatened attempt of said defendants Murray W. Latimer, James A. Dailey and Lee M. Eddy, purporting to act as members of the Railroad Retirement Board, to force complainant to gather and keep records of the employees of complainant would, if complainant should gather and keep such records, put complainant to great expense in obtaining, keeping and supplying the data necessary to arrive at the amount of annuity to which each such employee may be entitled, by reason of the provisions of the Railroad Retirement Act of 1937, as follows:

The annuities payable under the Railroad Retirement Act of 1937 are based upon the "years of service" of the employee. The annuity to which the employee is entitled is to be computed, under the terms of the act, by multiplying the employee's "years of service" by given percentages of his "monthly compensation." "Years of service," under the act, means the number of years an individual as an employee shall have rendered service to one or more employers for compensation or received remuneration for time lost. Where service before January 1, 1937, enters into the computation the act prescribes (1) "that with respect to service prior to January 1, 1937, the monthly compensation shall be the average compensation earned by an employee in calendar

months included in his years of service in the years 1924-1931, and (2) that where service in the period 1924-1931 is, in the judgment of the board, insufficient to constitute a fair and equitable basis for determining the monthly compensation for service prior to January 1, 1937, the board shall determine the monthly compensation for such service in such manner as in its judgment shall be just and equitable.

By reason of the facts alleged in the next preceding four paragraphs, very heavy burdens and large accounting costs will be imposed upon complainant which will be wholly uncompensated by any remedy at law, but will be largely avoided by the remedy in equity herein sought.

Wherefore, complainant prays:

That this Court, pending the final hearing of this case, issue a temporary restraining order against defendants and each of them individually and in their purported official capacities, and all of their agents and representatives purporting to act under them from doing or attempting to do any of the acts or things which complainant hereinafter prays they be permanently enjoined from doing or attempting to do.

The complainant further prays that upon final hearing:

1. This Court adjudge and decree that none of the provisions of the Railroad Retirement Act of 1935, or of the Railroad Retirement Act of 1937,

or of the Carriers' Taxing Act of 1937, apply to complainant, State of California, as owner and operator of the State Belt Railroad, or to any of complainant's officers or employees performing any services in connection with or for said State Belt Railroad; that said acts do not and each of them, does not authorize the imposition of any tax upon the State of California or upon any of its employees, or authorize the payment of annuities to any of such employees, or the payment of death benefits with respect to the death of any of such employees, or make any of such employees a member of the retirement system established by the Railroad Retirement Act of 1935, or authorize the receiving of credit in such system by any such employee for service to any "employer," as defined in the Railroad Retirement Act of 1937.

2. Defendants Murray W. Latimer, James A. Dailey, and Lee M. Eddy, individually and as members of said Railroad Retirement Board, and their successors in office, and all those acting or claiming to act under their authority or by their direction, be permanently enjoined from taking any step or action to enforce the Railroad Retirement Act of 1935, or the Railroad Retirement Act of 1937 against complainant herein; and from making any order, and from instituting or taking any step toward the institution of any actions, proceedings, or prosecutions, designed to compel complainant or its officers or any of them to

assemble, compile, or furnish any of the information and records required, or which may be required to be furnished under said acts or either of them; and from making or certifying to the Secretary of the Treasury or any other officer of the Treasury Department any award or payment of any information relating thereto designed to authorize, effectuate, or result in any disbursement in payment of any annuity to any employee of complainant, or any benefit with respect to the death of any such employee, or other benefit with respect to any such employee.

3. Defendant Guy T. Helvering, individually and as Commissioner of Internal Revenue, and his successor or successors in office, and all those acting or claiming to act under his authority or by his direction, be permanently restrained and enjoined from making any order and from instituting or taking any steps toward the institution of or maintaining any actions, proceedings, or prosecutions designed to compel complainant or its officers or any of them to pay any amount pursuant to the Carriers' Taxing Act of 1937, and from demanding, collecting or attempting to collect any such amount from complainant or its officers or any of them, and from requiring or demanding from complainant or its officers or any of them the compilation or filing of any return or statement with respect to compensation paid employees, deductions made from such compensation, or taxes payable pur-

suant to said act, or any other return or statement.

To the end, therefore, that defendants may, if they can, show why complainant should not have the relief herein prayed for, complainant further prays that the court issue its writ of subpoena directed to the defendants and each of them, requiring them to appear and answer this bill, but not under oath, their answers under oath being expressly waived, and to abide by and perform such orders and decrees in the premises as to the court will seem proper and required by the principles of equity and good conscience; and complainant prays that it shall have such other, further, and general relief as may be equitable.

U. S. WEBB,
Attorney General of
the State of California,

H. H. LINNEY,
Deputy Attorney General,

LUCAS E. KILKENNY,
Deputy Attorney General,

JAMES J. ARDITTO,
Deputy Attorney General,
Attorneys for Complainant.

VERIFICATION

UNITED STATES OF AMERICA,

State of California,

○ County of Sacramento

ss.

James J. Arditto, being first duly sworn, deposes and says:

That he is a duly appointed and acting Deputy Attorney General of the State of California and as such makes this affidavit for the reason that U. S. Webb, the Attorney General of said State, is absent from the county of Sacramento and is unavailable for the purpose of making said affidavit;

That he has read the foregoing Bill of Complaint and knows the contents thereof and that the facts therein stated are true;

Further, that the Attorney General of the State of California is duly authorized to pray leave to file said Bill of Complaint.

JAMES J. ARDITTO,
Deputy Attorney General,
of California.

Subscribed and sworn to before me by James J. Arditto this ----- day of March, 1938.

Notary Public in and for the
County of Sacramento, State
of California.

EXHIBIT "A"

Murray W. Latimer
Chairman

Lester P. Schoene
General Counsel

J. A. Dailey
L. M. Eddy
R. B. Bronson
Secretary

RAILROAD RETIREMENT BOARD
Washington

September 20, 1937

The Honorable Joseph P. Cereghino
Assistant Secretary of the Board of
State Harbor Commissioners
San Francisco, California

Dear Sir:

There has been referred to this office for attention your affidavit of August 31, accompanying your report under the Railroad Retirement Act of 1937 on Forms BA-2, BA-3, BA-4 and BA-5, of compensation earned by each employee of the State Belt Railroad. You contend in substance that since the State Belt Railroad is wholly owned and operated by the State of California it is not subject to the Railroad Retirement Act of 1937, or the Carriers' Taxing Act of 1937.

Since the Railroad Retirement Board administers only the Railroad Retirement Act, and the Carriers' Taxing Act is administered by the Bureau of Internal Revenue, I must confine my consideration of your protest to its applicability to the Railroad Retirement Act. The Railroad Retirement Act of 1937 includes as an employer, among others, any express company, sleeping car company or carrier

by railroad subject to Part 1 of the Interstate Commerce Act. It neither expressly nor impliedly makes ownership of such a carrier by a State relevant to a determination of its status. The Interstate Commerce Commission has held the State Belt Railroad to be a common carrier by railroad subject to Part 1 of the Interstate Commerce Act (See *California Canneries v. Southern Pacific Company*, 51 I. C. C. 500), and in view of the Supreme Court's decision in *United States v. California*, 291 U. S. 175, there can be no doubt that the Supreme Court would uphold the Commission's decision. The State Belt Railroad, therefore, falls literally within the definition of *employer* in the Railroad Retirement Act. Nor is there any principle of inter-governmental immunity which would prevent the Federal Government from exercising with reference to a State any of the powers exercised in the Railroad Retirement Act. The opinion in *United States v. California* referred to above indicates clearly that there is no such immunity.

To the extent that an inter-governmental immunity from taxation may be asserted to be applicable to prevent the levy of the taxes provided for in the Carriers' Taxing Act of 1937, such immunity is relevant in the first instance only to the Carriers' Taxing Act and not to the Railroad Retirement Act. I am personally of the opinion that the State Belt Railroad is not immune to the levies provided for in the Carriers' Taxing Act, but as I have indicated above this is not a matter within my jurisdiction. Should it ultimately be established that this carrier is immune from the levies provided for in the Carriers' Taxing Act

then the Board would be required to consider the question whether identity of certain provisions in the Railroad Retirement Act and the Carriers' Taxing Act gives rise to such an implication of Congressional intent that the two Acts should be coextensive in applicability as to require exclusion from the Railroad Retirement Act, of an employer otherwise covered, upon the simple ground that it has been established to be immune to taxation. Unless and until such an immunity is established the question does not seem to me to be open for consideration by this Board.

In view of the circumstances above outlined I trust that the State Belt Railroad will cooperate with the Board in the compilation of records and the adjudication of claims. The burdens imposed by the Act are not great, and in my judgment the carrier would be ill advised to resist them.

Very truly yours,

LESTER P. SCHOENE
General Counsel

WESTERN UNION

WASHINGTON DC
1937 NOV 20 PM 1 03

U S WEBB

ATTORNEY GENERAL OF CALIFORNIA
STATE BLDG

RETEL NOVEMBER TWENTY STATE BELT
RAILROAD STOP LETTER OF SEPTEMBER
TWENTY OF LESTER P. SCHOENE GEN-
ERAL COUNSEL ADDRESSED TO HONOR-

ABLE JOSEPH P. CEREGHINO ASSISTANT
SECRETARY BOARD OF STATE HARBOR
COMMISSIONERS STATES BOARDS POSI-
TION STOP NOTHING TO ADD AT THIS
TIME

MURRAY W LATIMER

EXHIBIT "B"

TREASURY DEPARTMENT

Washington

Office of

COMMISSIONER OF INTERNAL REVENUE

Address Reply to Commissioner of Internal Revenue
and Refer to SST:RR:1

February 19, 1938

Hon. U. S. Webb,
Attorney General of California,
San Francisco, California.

Sir:

Reference is made to Bureau telegram dated February 12, 1938, in reply to your letter dated November 13, 1937, requesting advice as to whether the State Belt Railroad, San Francisco, California, and its employees are subject to the taxes imposed under the Carriers Taxing Act of 1937. Such telegram read as follows:

"STATE BELT RAILROAD SAN FRAN-
CISCO CALIFORNIA AND ITS EMPLOY-
EES HELD SUBJECT TO TAXES IM-

**POSED BY CARRIERS TAXING ACT OF
NINETEEN HUNDRED THIRTYSEVEN
LETTER FOLLOWS."**

In confirmation of the ruling set forth above, you are advised that after careful consideration of the evidence available to the Bureau and of the applicable provisions of the Carriers Taxing Act of 1937, it is held that liability for the taxes imposed under that Act is incurred by the State Belt Railroad and its employees.

Respectfully,

GUY T. HELVERING
Commissioner.

cc Collector,
San Francisco, California.

EXHIBIT C

Senate Bill No. 248.

CHAPTER 372.

An act to add Part 1, comprising sections 1690 to 3231, inclusive, to Division VI and to add sections 10004, 10005, and 10005.5 to, the Harbors and Navigation Code, relating to the harbor of San Francisco and the Board of State Harbor Commissioners for San Francisco Harbor, and to repeal certain acts and parts of acts specified herein.

[Approved by the Governor May 25, A. D. 1937.]

The people of the State of California do enact as follows:

SECTION 1. Part 1, comprising sections 1690 to 3231, inclusive, is hereby added to the Harbors and Navigation Code, to read as follows:

DIVISION VI. HARBORS AND PORTS.

PART 1. SAN FRANCISCO HARBOR.

CHAPTER 1. GENERAL PROVISIONS AND DEFINITIONS.

1690. Whenever the term "Board of State harbor commissioners," "board," "commissioners" or any other term designating the Board of State Harbor Commissioners for San Francisco Harbor is used in this part, it means and includes any successor to the Board of State Harbor Commissioners.

1691. Whenever the term "city of San Francisco," or the term "county of San Francisco," or "San Francisco," is used in this part, it means the City and County of San Francisco.

1692. "Board," as used in this part, means the Board of State Harbor Commissioners for San Francisco Harbor.

1693. "Fund," as used in this part, unless the context specifically indicates otherwise, means the San Francisco Harbor improvement fund.

CHAPTER 2. BOARD OF STATE HARBOR COMMISSIONERS.

Article 1. Administrative Provisions.

1700. There is in the State government a Board of State Harbor Commissioners for San Francisco Harbor, consisting of three commissioners. This board is the successor to all previous boards of State harbor commissioners for San Francisco Harbor. The commissioners shall hold office at the pleasure of the Governor. All vacancies on the board shall be filled by appointment by the Governor. When an appoint-

ment of a successor to any commissioner is made by the Governor, it is valid, subject to the consent of the Senate at its next regular session. Until such session the person appointed has the same authority as if his appointment had been confirmed by the Senate.

1701. If the Senate, during its session, fails to act on or if it refuses its consent to any appointment the Governor may make to the board, the Governor shall, after the adjournment of the Senate, appoint the persons he desires to appoint, which appointments are valid, subject to the consent of the Senate at its next regular session. Until such session these appointees have the same authority as if their appointments had been confirmed by the Senate.

1702. The Governor of the State and the mayor of the city of San Francisco are ex officio additional members of the board only for the special purposes authorized by this part, but they shall participate in the action of the board, only as specifically provided by this part.

1703. The commissioners shall each give an official bond in the sum of fifty thousand dollars, which, if satisfactory, shall be approved by the Governor and State Treasurer by written indorsement thereon.

Neither a commissioner nor any officer of the State, nor any officer or member of the Legislature, shall be accepted as a surety on these bonds. Each bond, accompanied by the official oath required by law, shall be filed and recorded in the office of the Secretary of State within fifteen days after the appointment of the commissioner for whom it is given.

1704. Official bonds which are required to be given by this part shall be in favor of the people of the State of California.

1705. The annual salary of the president of the board is five thousand dollars; and the annual salary of each of the other two commissioners is three thousand dollars. The salaries of the secretary and the attorney shall be fixed by the board, with the approval of the Director of Finance. The board shall fix the compensation of other employees. When salaries or compensation are due for services rendered in connection with any work which is payable from the proceeds of the sale of bonds, such salaries or compensation shall be paid out of the proceeds of these bonds. All other salaries and compensation shall be paid out of the San Francisco Harbor improvement fund.

An ex officio officer or consulting engineer shall not receive any compensation, except traveling and other incidental expenses.

1706. With the exception of money received from the sale of bonds the disposition of which is otherwise provided for by law, all money received by the board pursuant to

this part shall be accounted for and reported monthly by the board to the State Controller and at the same time remitted to the State treasury to the credit of the San Francisco Harbor improvement fund. The fund shall be expended, in accordance with law, for the payment of all actual and necessary expenses incurred in carrying out the provisions of law prescribing or relating to the duties, powers, purposes, responsibilities, jurisdiction, and the work and affairs of the board.

1707. The revenue collected and disbursed by authority of this part shall be lawful money of the United States.

1708. The board shall, on or before the first day of November, in each odd-numbered year, make a full report to the Governor of all money received and disbursed by it, stating specifically, their source and the purpose for which expended. The report shall include a concise account of all improvements made, and the general condition of the property in charge of the board.

1709. The board shall adopt a seal.

1710. The Attorney General shall give such legal advice and render such legal services as may be required of him by the board, in connection with its duties, without further compensation.

Article 2. Officers, Appointees and Employees.

1730. The board shall organize by electing one of its members president. He shall preside at its meetings, supervise the official conduct of its officers and employees, especially in the collection, custody, and disbursement of the revenues, and shall require all the books, papers, and accounts to be accurately kept in proper form, and require the provisions of law and the regulations of the board to be enforced and observed. He may administer official oaths to the officers and employees of the board, except the other commissioners, and to all other persons in relation to the business of the board.

1731. The president is the chief executive officer of the board and shall supervise the conduct of the dock system, the State Belt Railway, and all other departments of the harbor business.

1732. The board shall appoint the following officers: A secretary, an assistant secretary, an attorney, a chief wharfinger, and any necessary number of wharfingers and collectors.

1733. The secretary shall keep the office of the board open every day, legal holidays excepted, from nine a.m. till four p.m. He shall safely keep and is responsible for all moneys paid into the office, and for all the books and papers of the board. He shall attend meetings of the board and keep a

perfect record of its proceedings, with the names of the commissioners present.

He shall keep in proper books an account of all money received and paid pursuant to this part, and on or before the fifth day of each month, send to the State Controller a statement thereof for the preceding month, under oath, showing the sources from which money was received, and the purposes for which paid, and he shall also report to the Controller the amount paid to the State Treasurer for the month covered by the statement.

He shall record, at length, all contracts and agreements made by the board, and keep a record of all personal property purchased, and its cost; and if any is sold, the name of the purchaser, date of sale, and the price received.

Before entering on the duties of his office, he shall give an official bond in the sum of fifty thousand dollars, and take and subscribe an official oath. The bond, if satisfactory, shall be approved by the board, by written indorsement thereon, and filed with his oath in the office of the Secretary of State.

1734. The assistant secretary shall attend the office during office hours, and shall perform any service which may be required of him by the secretary of the board. Before entering on his duties, he shall give an official bond in the sum of twenty thousand dollars, and take and subscribe an official oath. The bond, if satisfactory, shall be approved by the board by written indorsement thereon, and filed with his oath in the office of the Secretary of State.

The attorney shall attend to the prosecution and defense of all suits, and render such legal service as may be required of him by the board.

1735. The chief wharfinger shall station, berth, and regulate the position of vessels in the docks and harbor, and cause them to remove from time to time, and from place to place, as the general convenience, safety, and good order may require. He shall also assign berths to vessels in the order of their application after entering the harbor.

He shall also supervise the wharfingers, and report to the board all cases of failure to perform their duties. He shall also require all shipmasters, consignees, pilots, and masters of towboats to conform to the regulations of the board.

He shall also require the docks, slips, wharves, piers, and other premises under the jurisdiction of the board to be kept free of all obstructions, and when any person fails to obey his order to remove them, he shall forthwith report the fact to the board, and execute its order in relation thereto.

He shall also take and subscribe an official oath, and give such official bond as the board may require, subject to its approval, to be indorsed thereon. The bond and oath shall be filed in the office of the board.

1736. The chief wharfinger shall keep an office in some convenient place upon the city front, between Market and Pacific streets, which shall be kept open every day, Sundays and holidays excepted, from seven a.m. till six p.m. The board shall furnish a suitable building for an office, for the exclusive use of the chief wharfinger and assistant chief wharfinger, with suitable office furniture. The chief wharfinger shall execute and enforce the rules and regulations which may be established by the board pursuant to the provisions of this part. All pilots, masters of tugboats, masters, owners, and consignees of vessels, shall obey all lawful orders and directions of the chief wharfinger in relation to the stationing, anchoring, and removal of vessels pursuant to such rules and regulations. The chief wharfinger may determine cases of collision, by consent of all parties interested, and where damages do not exceed three hundred dollars his decision is final.

1737. The chief wharfinger shall take in charge all abandoned vessels and all vessels picked up adrift, and secure them, after which he shall advertise, for one week, in one of the daily newspapers printed in the city of San Francisco, giving the full particulars and requesting that all persons interested appear and establish their title or claim within twenty days from the last publication. If claimed within that period, such property shall be delivered to the owner on payment of all costs of removing, securing, and advertising it. If not claimed within that period, or if the owner fails to pay the charges, such property shall be sold by the chief wharfinger, at public auction to the highest bidder and the proceeds, less the costs, shall be paid to the owner, if claimed by him, or, if not claimed by the owner, shall be paid to the board; but the owner is entitled to receive from the board the amount so paid, if he claims it within one year from the date of payment to the board.

For the purposes of this section the harbor of San Francisco includes the tidewaters of the city of San Francisco, and the jurisdiction of the chief wharfinger is, when performing the duties required by this section, coextensive with such tide-waters.

1738. The wharfingers have supervision of the wharves to which they are assigned, and they shall require the regulations of the board and orders of the chief wharfinger to be respected and obeyed, and good order preserved thereon.

1739. The collectors shall collect the revenues in the manner the board directs, and shall daily account for and pay all moneys into the board's office.

The wharfingers and collectors shall each take and subscribe an official oath, and give such official bond as the board

may require, subject to its approval, to be indorsed thereon. The bond and oath shall be filed in the office of the board.

1740. The board shall appoint a chief engineer. His salary shall be fixed by the board, with the approval of the Director of Finance and shall be paid out of the San Francisco harbor improvement fund. He shall take and subscribe an official oath, and furnish the State with a bond in the sum of ten thousand dollars for the faithful performance of his duties, which bond, if satisfactory, shall be approved by the Governor and filed with his oath in the office of the Secretary of State.

1741. The chief engineer shall prepare such plans and specifications as the board may direct, and if they are adopted, and the work is ordered by the board to be done, he shall superintend it. He shall give constant attention to the condition of the seawall and thoroughfare, buildings, structures, wharves, and the streets or parts thereof under the jurisdiction of the board.

When repairs are needed he shall report to the board their nature and extent, and if ordered by the board he shall have them made at once. He shall also keep himself informed as to the depth of water in the various docks and slips, and report to the board when dredging is required and if ordered by the board he shall have it done. He shall keep records showing the date, place, and character of every piece of work done and dock dredged, when begun, and when finished, with proper descriptions and drawings. He shall do all engineering work required by the board, and shall be subject at all times to its control. He shall devote his entire time to the service of the board.

1742. The board may, in its discretion, employ an assistant to the chief engineer, an assistant to the chief wharfinger, draftsmen, a superintendent of dredgers, and such men on the dredgers, scows, towboats, and fire boats, and in doing urgent repairs as it deems advisable, and prescribe their bonds, duties, and compensation.

1743. A person shall not be appointed to any office by virtue of this part unless he is a qualified elector of the State, nor shall any person be so appointed or employed who is interested in any vessel sailing or plying in and out of or on the inland waters of the Bay of San Francisco, as owner, mortgagee, or otherwise, or as a stockholder in any company owning such vessels, or who is a consignee, the general or freight agent or manager of any such vessel, or agent or other employee of the owner of any such vessels, or who is engaged in the business of marine insurance, or of procuring such insurance, or who is engaged as a stevedore, in loading and discharging such vessels.

1744. A person who is not a citizen of the United States shall not be employed either as contractor or laborer on any work done under this part.

1745. Eight hours shall constitute a legal day's work, whether performed directly for the State or for the person or persons receiving a contract under this part.

1746. An officer or employee of the board shall not be removed or otherwise prejudiced for refusing to contribute to any political fund, or to render any political service; nor shall the members of the board, collectively or individually, use their official influence to coerce the political action of any officers or employees.

1747. All the above-named officers shall perform such other duties pertaining to their positions as the board may prescribe.

CHAPTER 3. BOUNDARIES.

1770. Subject to any valid leases the board has possession and control of that portion of the bay of San Francisco, and the adjacent territory, together with all the improvements, rights, privileges, easements, and appurtenances connected therewith, or in anywise appertaining thereto, for the purposes provided by this part, which is bounded as follows:

Commencing at the intersection of the center line of Lewis Street with the center line of Webster Street; running thence easterly along the center of Lewis Street to a point distant 514.19 feet westerly from the westerly line of Van Ness Avenue; thence northerly 21.78 feet to a point distant 514.65 feet westerly from the westerly line of Van Ness Avenue; thence easterly 156.0 feet to a point distant 358.68 feet westerly from the westerly line of Van Ness Avenue and 25.02 feet northerly from the center line of Lewis Street; thence southerly 25.02 feet to a point on the center line of Lewis Street distant 358.16 feet westerly from the westerly line of Van Ness Avenue; thence easterly along the center of Lewis Street to the center of Polk Street; thence southerly along the center of Polk Street to the southerly line of the Embarcadero; thence easterly along the southerly line of the Embarcadero to a point 275 feet west of the westerly line of Hyde Street measured at right angles thereto; thence southerly parallel with the westerly line of Hyde Street to a point 225 feet north of the northerly line of Jefferson Street; thence easterly parallel with the northerly line of Jefferson Street to the westerly line of Hyde Street; thence southerly along the westerly line of Hyde Street to the center of Jefferson Street; thence easterly along the center of Jefferson Street to the southerly line of the Embarcadero; thence easterly along the southerly line of the Embarcadero to the center of Powell Street; thence southerly along the center

of Powell Street to the center of Beach Street; thence easterly along the center of Beach Street to the southerly line of the Embarcadero; thence easterly along the southerly line of the Embarcadero to the center of Grant Avenue; thence southerly along the center of Grant Avenue to the center of North Point Street; thence easterly along the center of North Point Street to the southwesterly line of the Embarcadero; thence south-easterly along the southwesterly line of the Embarcadero to the center of Kearny Street; thence southerly along the center of Kearny Street to the center of Francisco Street; thence easterly along the center of Francisco Street to the center of Montgomery Street;

Thence southerly along the center of Montgomery Street to the center of Chestnut Street; thence easterly along the center of Chestnut Street to the center of Sansome Street; thence southerly along the center of Sansome Street to the center of Lombard Street; thence easterly along the center of Lombard Street to the westerly line of the Embarcadero; thence southerly along the westerly line of the Embarcadero to the center of Battery Street; thence southerly along the center of Battery Street to the center of Greenwich Street; thence easterly along the center of Greenwich Street to the westerly line of the Embarcadero; thence southerly along the westerly line of the Embarcadero to the center of Front Street; thence southerly along the center of Front Street to the center of Vallejo Street; thence easterly along the center of Vallejo Street to the center of Davis Street; thence southerly along the center of Davis Street to the center of Pacific Street; thence easterly along the center of Pacific Street to the westerly line of the Embarcadero; thence southerly along the westerly line of the Embarcadero to the center of Folsom Street; thence westerly along the center of Folsom Street to the center of Steuart Street; thence southerly along the center of Steuart Street to the westerly line of the Embarcadero; thence southerly along the westerly line of the Embarcadero to a point 137.5 feet southerly from the southerly line of Harrison Street, measured at right angles thereto; thence westerly parallel to Harrison Street to the center of Spear Street; thence southerly along the center of Spear Street to the westerly line of the Embarcadero; thence southerly along the westerly line of the Embarcadero to the center of Bryant Street; thence westerly along the center of Bryant Street to the center of Beale Street; thence southerly along the center of Beale Street to the westerly line of the Embarcadero; thence southerly along the westerly line of the Embarcadero to the center of Brannan Street; thence westerly along the center of Brannan Street to the center of First Street; thence southerly along the center of First Street to the westerly line of the Embarcadero; thence southerly along the westerly line of the Embarcadero to the

center of Townsend Street; thence westerly along the center of Townsend Street to the center of Gale Street; thence southerly along the center of Gale Street to the center of King Street; thence westerly along the center of King Street to the center of Second Street;

Thence southerly along the center of Second Street to the center of Berry Street; thence westerly along the center of Berry Street to the center of Third Street; thence southerly along the center of Third Street to the northerly line of Channel Street; thence westerly along the northerly line of Channel Street to the easterly line of Seventh Street; thence southerly along the easterly line of Seventh Street to the southerly line of Channel Street; thence easterly along the southerly line of Channel Street to the center of Third Street; thence southerly along the center of Third Street to the center of Fourth Street; thence southeasterly along the center of Fourth Street to the center of Georgia Street; thence southerly along the center of Georgia Street to the center of Alameda Street; thence easterly along the center of Alameda Street to the westerly line of the Embarcadero; thence southerly along the westerly line of the Embarcadero to a point distant 130 feet easterly from the easterly line of Georgia Street, measured at right angles thereto; thence southerly, parallel with Georgia Street to the center of El Dorado Street; thence westerly along the center of El Dorado Street to the center of Illinois Street; thence southerly along the center of Illinois Street to the southerly line of Eighteenth Street; thence easterly along the southerly line of Eighteenth Street to the waterfront line established by the Board of State Tideland Commissioners; thence southerly along said last mentioned line to the northerly line of Tulare Street; thence westerly along the northerly line of Tulare Street to the center of Texas Street; thence southerly along the center of Texas Street produced to the southerly line of Islais Street produced westerly; thence easterly along the southerly line of Islais Street to the easterly line of Third Street; thence southerly along the easterly line of Third Street to the southwesterly line of Arthur Avenue; thence southeasterly along the southwesterly line of Arthur Avenue to the westerly line of India Street; thence southerly and easterly along the westerly and southerly lines of India Street to the center of Waterfront Street; thence southerly along the center of Waterfront Street to the northwesterly line of China Street; thence southwesterly along the northwesterly line of China Street to the southwesterly line of Custer Street; thence southeasterly along the southwesterly line of Custer Street to the southeasterly line of Dry Dock Basin; thence northeasterly along the southeasterly line of Dry Dock Basin to the waterfront line established by the

Board of State Tideland Commissioners; thence southerly along said last mentioned line to the northeasterly line of Evans Avenue produced; thence northwesterly along the northeasterly line of Evans Avenue produced, to the center of Waterfront Street; thence southerly along the center of Waterfront Street to the northeasterly line of Shafter Avenue; thence northwesterly along the northeasterly line of Shafter Avenue to the northwesterly line of Alvord Street; thence southwesterly along the northwesterly line of Alvord Street to the northeasterly line of Wallace Avenue; thence northwesterly along the northeasterly line of Wallace Avenue to a point distant 239.32 feet southeasterly from the southeasterly line of Ingalls Street; thence southwesterly to a point on the southwesterly line of Yosemite Avenue distant 316.27 feet southeasterly from the southeasterly line of Ingalls Street; thence southeasterly along the southwesterly line of Yosemite Avenue to the center of Waterfront Street; thence southerly along the center of Waterfront Street to the southern boundary of the City and County of San Francisco; thence along the southerly, easterly and northerly boundary lines of said city and county to a point due north of the place of commencement; thence south to the place of commencement.

1772. The board has the powers, controls and possessions granted by this part relating to properties of the State of California mentioned in this part in addition to all powers, controls and possessions otherwise granted the board by the laws of the State of California.

The board has the possession, management and control of all property belonging to the State located within the city of San Francisco, but outside of the boundaries of the pueblo of San Francisco and which property is appurtenant to, or adjacent to, or constitutes a portion of the navigable waters of the bay of San Francisco, or any arm, channel, basin, inlet, or waterway constituting a part of or adjacent to, the bay of San Francisco, within the city of San Francisco.

1773. Seawall lot number twenty-six is all that certain lot, piece or parcel of land situate, lying and being in the city of San Francisco, State of California, and particularly described as follows:

Beginning at the point where the northeasterly line of Third Street cuts the southeasterly line of Berry Street, said point being distant three hundred twenty-two and five-tenths (322.5) feet from the southeasterly line of King Street; thence running easterly at an angle of nineteen degrees seventeen minutes twenty-six seconds ($19^{\circ} 17' 26''$) with said southeasterly line of Berry Street eight hundred eighty-eight and fifty-four hundredths (888.54) feet, more or less, to the westerly line of the Embarcadero; thence northerly along

said line of the Embarcadero two hundred thirty-six and ninety-eight hundredths (236.98) feet, more or less, to the southeasterly corner of seawall lot number twenty-five (25); thence at a right angle westerly along the southerly line of said lot one hundred ten and ninety-six hundredths (110.96) feet, more or less, to the southwesterly corner of said lot; thence northwesterly along the southwesterly line of said lot forty-one and forty-eight hundredths (41.48) feet, more or less, to the westerly corner of said lot; thence at a right angle southwesterly along the southeasterly line of Berry Street nine hundred eight and ninety-one hundredths (908.91) feet to the point of beginning; containing three and four-tenths (3.4) acres of land.

1775. For the purpose of acquiring additional area for the construction of docks, wharves, slips, and piers and increasing the harbor facilities on the water front of the city of San Francisco, the board may acquire, when in its discretion it is deemed for the best interests of the harbor, by purchase, condemnation, gift, grant, or cession, for and on behalf of the State, all that certain tract or parcel of land situated in the city of San Francisco, State of California, and particularly described as follows:

Commencing at a point in the bay of San Francisco, distant three thousand five hundred seventy feet southeasterly from the southerly corner of Brannan and Second streets, as the same are laid down on the official map of said city, said distance being measured along the extension southeasterly of the southwesterly line of Second Street; thence in a southwesterly direction, at right angles with said line of Second Street extended, five hundred feet; thence at right angles southeasterly eight hundred feet; thence at right angles northeasterly eight hundred feet; thence at right angles northwesterly eight hundred feet; and thence at right angles southwesterly three hundred feet, to the point of commencement; said tract of land being a square, including the rock known as Mission rock, together with the wharves and other improvements thereupon and the appurtenances thereunto belonging.

The jurisdiction of the board is extended so as to include all of the land described in this section.

The portion of said tract held in private ownership and the portions that are owned by the United States of America may be separately acquired by the board, and the board may accept from the United States a cession or gift or grant or it may acquire all or any portion of the tract by purchase or condemnation.

The board may pay the purchase price thereof, or any judgment rendered, in such condemnation proceedings by drafts drawn upon the Controller of the State, who shall draw his

warrant or warrants therefor on the State Treasurer, payable out of any moneys in the State treasury to the credit of the "San Francisco harbor improvement fund" or of the "Third San Francisco sea wall fund," or partly from one and partly from the other of these funds, in the discretion of said board.

1776. The board may acquire, by purchase or condemnation, any land held in private ownership seaward of the water front line for the purposes of commerce and navigation, and any land lying seaward of the water front line of the city of San Francisco is necessary for commerce and navigation and is hereby declared a public use for that purpose.

1777. The board may acquire by purchase or by exchange of property, any lands along the water front of the city of San Francisco for the purpose of the commerce of the port and upon such acquisition, the jurisdiction of the board is extended so as to embrace such property.

1778. For the purpose of acquiring terminal facilities for the landing of passengers to and from the passenger and ferry depot at the foot of Market Street, in the city of San Francisco, the board may institute condemnation proceedings in the superior court of the city of San Francisco, against all parties in interest claiming any title in and to that certain lot, piece, or parcel of land in the city of San Francisco, bounded and described as follows, to wit:

Commencing at a point on the westerly line of East Street, distant thereon sixty (60) feet and four (4) inches northerly from the northwesterly corner of the intersection of the northerly line of Market Street with said westerly line of East Street; thence southerly along said westerly line of East Street sixty (60) feet and four (4) inches to the intersection of said line of East Street with the northerly line of Market Street; thence westerly along the northerly line of Market Street eighteen (18) feet and six (6) inches to the intersection of the northerly line of Market Street with the north line of Sacramento Street; thence west along the north line of Sacramento Street seventy-nine (79) feet and eleven (11) inches to a point on said north line of Sacramento Street; thence northeasterly to the point of beginning.

The inshore limit of the jurisdiction of the board is extended so as to include the lot of land described in this section.

The board may pay any judgment rendered against it in such condemnation proceedings, by a draft drawn upon the Controller of the State, who shall draw his warrant therefor on the State treasury, payable out of any money in the treasury credited to the San Francisco harbor improvement fund.

1779. So much of the line for a harbor embankment or sea wall of the Port of San Francisco, adopted on the twelfth day of September, one thousand eight hundred and seventy-seven, by the Governor, the mayor of the city of San Francisco; and the State Harbor Commissioners, and indicated on the maps filed in the offices of the Board of Harbor Commissioners and of the recorder of the city of San Francisco, as extends from the east line of Taylor Street to the boundary line between the city of San Francisco and the county of San Mateo, and the water front line as described by Chapter 119 of the Statutes of 1880, page 132, is hereby ratified and confirmed, and shall be known as the "Water Front Line" of the city of San Francisco.

1780. The inshore limit of the jurisdiction of the board shall be and remain as defined in this part; but when any section of the sea wall and thoroughfare mentioned in Chapter 8, of this part, is constructed and ready for use, then the inshore limit of its jurisdiction as to such section shall be the inner line of said thoroughfare. But its jurisdiction in and over China, Central, South, India, and Dry Dock basins, and in and over Channel Street, and Islais Creek channel, and the canal opening into South Basin, shall extend as far as the ebb and flow of tidewater.

1781. China, Central, South, India, and Dry Dock basins, as laid out by the Board of Tide Land Commissioners, and Channel Street, Islais Creek Channel, and the canal opening into South Basin, as far as the ebb and flow of tide in them, are dedicated to public use for the purposes of commerce and navigation, and are subject, together with the streets inclosing or bounding on them, and the sea wall and thoroughfare constructed across their openings, to the jurisdiction of the board. In case the sea wall or thoroughfare is extended across them, openings therein, with proper drawbridges, shall be constructed, of sufficient width to allow free and easy entrance and exit, and they shall be dredged to such depth as may be needed by the class of vessels using them.

1782. If the lines of the water front of the city of San Francisco, or the lines of any of the streets ending at the waterline are changed by authority of this part, the board shall cause to be made two accurate maps of survey, showing such change, which maps shall be dated, certified, and signed by the members of the board and its engineer; one to be filed in the office of the recorder of said county and the other in the office of the board. When filed, they are official maps in all courts of record.

1783. The board may make an agreement with the owner of any property, lying adjacent to the water front

property under the jurisdiction of the board, for the purpose of determining the precise location of any seawall, thereafter to be built, adjacent to or upon such privately owned property and may accept grants of land from such private property owners in consideration thereof. When such agreement has been made, the determination of the location is binding on all succeeding boards.

1784. The board has possession, jurisdiction and control over the blocks and parts of blocks formed by the change of the water front and the extensions of the streets to the water front thoroughfare, and it shall remove any obstructions placed thereon in the same manner as provided for the removal of obstructions from the piers, wharves and thoroughfares. The board may keep and maintain these blocks and parts of blocks as open spaces for the use of the public, or it may inclose them. The board may also assign the use of portions thereof for purposes most advantageous to the commerce of the port, and upon such terms and conditions as it may determine. All such assignments shall terminate at the pleasure of the board.

1785. Whenever the board is authorized to acquire any lands or property by purchase or condemnation, the uses mentioned in the law authorizing such acquisition are hereby declared to be public uses, in behalf of which the right of eminent domain may be exercised by the board for and in the name of the people of the State of California, for the estates and rights specified in, and in the manner provided in Part III, Title VII, of the Code of Civil Procedure.

1786. Upon the termination of any lease of property subject to its jurisdiction, the board shall take possession of such property and its improvements. Until the termination of such lease the board shall require that no rights or privileges are exercised which are not conferred by a lease.

1787. The fact that this code is enacted at a date subsequent to the enactment of the California Toll Bridge Authority Act, shall not be construed to alter, increase or diminish the respective rights, powers, duties, responsibilities and jurisdiction of the Board of State Harbor Commissioners for San Francisco Harbor, the California Toll Bridge Authority, or the Department of Public Works.

CHAPTER 4. POWERS.

Article 1. In General.

1900. The board may make reasonable rules and regulations concerning the control and management of the property of the State which is intrusted to it by this part. The board shall also make and publish not less than thirty days in a

daily newspaper of general circulation published in the city of San Francisco, all needful rules and regulations not inconsistent with the laws of the State or of the United States in relation to the mooring and anchoring of vessels in the harbor, and in relation to providing and maintaining free, open, and unobstructed passageways for steam ferryboats and other steam vessels navigating the waters of the bay of San Francisco and the fresh-water tributaries of the bay so that such steam vessels can conveniently make their trips without impediment from vessels at anchor or other obstacles.

1901. The board may rent an office in the city of San Francisco, between Montgomery, Market and Pacific streets and the city front; and it may purchase suitable books for the records of the secretary and accounts of the wharfingers, together with such stationery as may be required by the board.

1902. The board may insure against loss or damage by fire or other disaster the wharves, docks, bulkheads and structures contained thereon, and improvements located on the inside and outside of the water front line, and a property of the State under its control and supervision.

1903. The cost shall not exceed two per cent per hundred in premiums for policies to be written for a three years' term and it shall be paid out of the San Francisco harbor improvement fund.

1904. The board may construct, maintain, and operate freight storage space, oil tanks, and other oil containers and facilities in connection therewith as may be expedient and to the advantage of the commerce of the port of San Francisco, in order that the present practice of storage at the port of San Francisco may be continued. It may fix charges and make rules and regulations for the operation thereof.

1905. The board may also construct maintain, and operate conveyors on, above and under the ground from and to and between the piers and wharves and other property of the State and to and from the piers and wharves and other property of the State and under the jurisdiction of the board and to and from the property owned by the State and fronting on the Embarcadero from any property of the State under the jurisdiction of the board as is expedient and to the advantage of the commerce of the port of San Francisco, and it may fix all charges and make rules and regulations for the operation thereof.

1906. This chapter does not constitute the board warehousemen nor authorize it to engage in the warehouse business, or to issue warehouse or storage receipts, or otherwise to act as bailee, or to exercise other than a governmental function in carrying out the purpose of this part. The purpose of this chapter is to enable the board to furnish necessary storage

space for export and import tonnage, and competitive tonnage, which could use other ports, and which needs temporary storage through inability to connect with forwarding carriers, so as to enable this tonnage to move through the port of San Francisco, but this declaration of purpose shall not limit or qualify the rights or duties of the board to construct, maintain, or operate oil tanks and other oil containers.

1907. The board may make rules and regulations governing:

(a) The removal of vessels from wharves and other landings, and from slips and docks when they are not engaged in receiving or discharging cargo.

(b) Prescribing the time during which goods landed upon any wharf or thoroughfare may remain thereon, and it may divide the same into several classes, and provide that if any such goods remain upon any wharf, or thoroughfare beyond the term so prescribed, the respective wharfinger may, under the order of the board, remove and deposit the same in a suitable place, at the charge, risk, and expense of the owner.

1908. The board may contract with the city of San Francisco for the use of two fire boats owned by the city and as long as these boats remain in commission, for use on San Francisco Bay for protection against fires of shipping and for the protection of the property of the State or any political subdivision thereof on the water front of San Francisco. One-half of the expense of maintenance of the fire boats shall be paid by the city and one-half shall be paid out of the San Francisco harbor improvement fund. The amount so expended out of the San Francisco harbor improvement fund shall not exceed the sum of ninety-two thousand five hundred dollars in any year.

The board of fire commissioners of the city shall each month make an itemized account of the expenses of maintenance of the fire boats, including the salaries of the officers, firemen and crews, and file two copies with the State Board of Harbor Commissioners and one copy with the Department of Finance. The Board of State Harbor Commissioners shall audit and certify to the account, and it shall transmit it to the Department of Finance.

In addition to the amounts which may be collected for the purposes specified in this part by the board, there shall be collected an amount sufficient to carry out the provisions of this section.

1909. The board, in addition to the powers now granted, or which may hereafter be granted to it by law, may locate, construct, maintain, operate and extend public drydocks in and about the portions of the bay of San Francisco under its jurisdiction.

1910. The board shall fix, regulate, impose and collect tolls or compensation for and upon the use of such public dry docks and regulate their use.

1911. All money collected for tolls or compensation for the use of public dry docks and all expenditures made in their maintenance and construction are subject to the same provisions as other money collected and expended by the board.

1914. The board may prosecute, in the name of the people of the State of California, actions for the possession of any portion of the premises described in this part, situated between the inshore line, or line nearest the mainland, and the line offshore six hundred and fifty feet therefrom, and parallel therewith, or for the annulling of any lease or contract entered into by the board in behalf of the State, or virtue of any general or special law, or for the collection of any money due, or which may become due the State by authority of this part.

The board may also prosecute actions for the removal of all unlawful obstructions in or upon the premises, or for the removal of all unlawful obstructions in or upon the streets through the center of which the inshore line, or line nearest the mainland, runs. It may also remove any unlawful obstructions thereon after the owner, possessor, or occupant of the obstruction has had five days' notice, in writing, to remove the same, either served on the owner, possessor, or occupant or posted upon the obstruction by the chief wharfinger, assistant wharfingers, or wharfinger.

Article 2. Commerce Merchants.

1906. Upon application of any person receiving or expecting to receive perishable products to be delivered by carrier upon any wharf on the San Francisco water front, the board shall issue free of charge a permit authorizing him to sell those products when delivered on the wharves or State property, during the time perishables are permitted to remain under the general regulations prescribed by the board.

1907. The permit shall not be issued unless the applicant has signed and filed with the board an application which reads as follows:

"I (or we) _____, expecting to receive and permit to be delivered by carrier on the wharves or other property of the State of California in the city of San Francisco, and desiring to dispose of those products before removal, hereby make application for a permit to be valid for one year from the date of issue, to sell perishable products on the wharves or other State property, in consideration of the

receipt of a permit, I (or we) promise to faithfully observe all the regulations which are or may be prescribed by the Board of State Harbor Commissioners in regard to such sales, and in particular I (or we) agree that I (or we) will not, during the life of the permit, be a party to any conspiracy, agreement or understanding whereby I (or we) shall refuse to sell to any solvent purchaser or buy from any person whatever, and I (or we) agree that I (or we) will sell, impartially, and at the same price, to all who desire to purchase for cash, without regard to their business or intended disposition of the products, and will exercise no discrimination whatever between buyers or sellers, by reason of their occupation, affiliations or nonaffiliations. I (or we) also agree that in case of violation of this agreement, the Board of State Harbor Commissioners may revoke the permit hereby applied for, whereupon I (or we) agree to surrender it, and I (or we) agree that the Board of State Harbor Commissioners shall be the sole judges of the fact of a violation, I (or we) having had a hearing in the matter.

Date,

1932. The permit shall be in any form the board determines and is valid for one year from date of issue.

1933. In case of a violation of the agreement contained in the application, by the holder, the board, upon a hearing after giving due notice to all persons concerned and finding the fact of a violation, shall revoke and cancel the permit, and it shall not issue a new permit to the offending person, except upon a new execution of the agreement and the payment of a fee of fifty dollars. The right to receive a new permit rests in the discretion of the board.

1934. Perishable products consigned to persons not holding the permit required by this article, and delivered by carrier upon any wharf on the San Francisco water front, shall be removed from the wharf within twenty-four hours after arrival, and the board shall levy and collect on each perishable products in addition to the regular tolls, any additional wharfage as it may prescribe, but not less than the amount of the regular tolls, for each twenty-four hours or fraction thereof which these perishable products remain upon the wharf.

1935. The board and all its officials and employees are charged with the enforcement of this article, and shall eject from the wharves or other state property all persons found attempting to make sales in violation thereof. The board through any officials it may designate, shall prosecute all violations of this article.

1936. Every person who sells upon the public wharves or other property belonging to this State in the city of San Francisco which is within the jurisdiction of the board, any

fruit, vegetables, poultry, eggs, honey, game, or other produce commonly known, and referred to as perishable products, unless he, or the person whom he duly represents, holds a permit issued in accordance with the provisions of this article, is guilty of a misdemeanor punishable by a fine of not less than twenty-five nor more than five hundred dollars.

Article 8. Aircraft Facilities.

1940. As used in this article:

"Aircraft" includes any contrivance used or designed for navigation or flight in the air, except a parachute, or other contrivance designed for air navigation but used primarily as safety equipment.

1941. "Airport" includes any terminal landing field or other supporting surface, including elevated platforms, structures fixed thereto or anchored or floating thereon, which is suitable for the landing or taking off of aircraft.

1942. "Platform" includes any terminal landing or other supporting surface, elevated or otherwise, which is suitable for the landing or taking off of aircraft.

1943. "Air navigation facility" includes any airport, landing platform, light, or other signal structure, radio directional finding facility, radio or other electrical communication facility, and any other structure or facility used as an aid to air navigation.

1944. The board may construct, keep, maintain and improve, upon any of the property under its control, at any location or locations which are advisable and the needs of commerce require, any number of platforms, or places for the landing of aircraft, airports or any air navigation facility, appurtenance, convenience or requirement necessary or useful in conjunction with, and in the furtherance of needs of commerce by aircraft.

1945. The board may by rules and regulations control the use of such places of landing, or of moorage, and the use of other property within its jurisdiction for any other kind of transportation, so as not to interfere with the transportation by air. It may regulate the receipt, deposit and removal of property, and the embarkation or disembarkation of passengers to and from such landing places or moorage.

It may charge fees and tolls for the use of landing places or for moorage, and it has a lien to enforce the payment thereof.

It may lease, or assign for operation, any place or appurtenance, appliance or other convenience, or thing useful in connection therewith, and it may do and cause to be done all things necessary in conjunction with air traffic, and

the property within its jurisdiction. It has the jurisdiction, and may exercise the powers, and perform the duties, authorized by this part so far as they apply to air traffic and are consistent therewith.

Article 4. Commissions on Bond Sales.

1960. The State Treasurer, upon the approval of the Governor and the Director of Finance, may enter into agreements to pay commissions for services rendered in procuring bids for all or any portion of the State bonds issued under the provisions of Chapter 603 of the Statutes of 1913.

The State Treasurer shall not agree to pay a greater commission than ten per cent of the par value of the bonds sold. A commission shall not be paid for services rendered except to one who has procured and effected the sale and not until the money from the sale of the bonds has been paid into the State treasury. A commission shall not be paid on any sale of these bonds to any board, department or agency of the State authorized by law to purchase them.

If any resale of the bonds purchased by a board, department or agency is made, the provisions of this article as to entering into agreements to pay, and the payment of commissions, apply to resales as well as to original sales of these bonds.

1961. The commissions authorized by this article shall be paid out of the San Francisco harbor improvement fund, and the State Controller shall draw his warrants on the fund in favor of the person entitled to the commission. Sufficient money is hereby appropriated from the San Francisco harbor improvement fund for the payment of such commissions as and when they become due.

1962. The board shall by the collection of dockage, tolls, rents, wharves and other port charges collect a sum of money sufficient for the purposes of this article, over and above the amount limited by this part.

1963. This article does not prevent an original sale, or a resale, by any board, department or agency of the State, of any of these bonds without the payment of commissions.

CHAPTER 5. COMMISSIONS.

Article 1. In General.

1964. The board has not entered into a valid contract or obligation which creates a liability or authorizes the payment of money, until it is signed by all three of the commissioners, and countersigned by the secretary of the board. The board shall not make any contract involving the payment of

money, unless the amount then to the credit of the harbor improvement fund, plus any sums which may be derived from the sale of bonds, together with the revenue estimated to accrue up to the time of the maturity of the contract, over and above the current expenses of the board, is sufficient to meet the payments to become due thereon. The estimate of revenue shall be limited, as to time, to fifteen years.

Article 2. Harbor Embankment and Sea Wall Construction.

2000. When the board determines to construct any part of the sea wall, it shall advertise for sealed proposals. The advertisement shall be published in at least two daily newspapers in San Francisco for at least thirty days and the advertisement shall give a full and accurate description of the work to be done, the place where it is to be done, and the material which is to be used. On the day stated in the advertisement, the bids shall be opened in the presence of the bidders who are present, and the contract awarded to the lowest bidder. The successful bidder shall give a bond, with two or more responsible sureties, to be approved, if satisfactory, by the board, for the due performance of the work. The board's approval shall be indorsed on the bond.

If the bids are too high, the board shall reject them and advertise anew, in like manner as before.

If the second bids are also too high, it shall reject them likewise, and it may enter into a contract with responsible persons without giving further notice.

2001. Persons entering into a private contract with the board shall give a bond, pursuant to section 2000, for the faithful performance of the contract. The consideration agreed to be paid in any contract entered into without giving public notice shall be five per cent lower than the lowest responsible bid rejected.

2002. The work to be performed under any one contract shall not exceed one thousand lined feet of harbor embankment or sea wall. But the board may enter into as many contracts at the same time as are expedient, if the amount in the harbor improvement fund, together with the revenue estimated to accrue pursuant to section 2000 is sufficient to meet the contract price of the work, after deducting the current expenses of the board and the amount required for erosion and repair of the wharves, dredging docks and slips, and for incidental expenses. The State is not liable on these contracts for any deficiency in the harbor improvement fund.

2003. Separate contracts may be entered into for dredging a channel for the reception of the rock removed for the construction of a harbor embankment. The provisions of the article relating to advertising for sealed proposals, and the

and opening of bids, and awarding of contracts shall be complied with in the letting of such work in separate contracts. The board may, if it will be more economical, dredge, with the dredge belonging to the State, the channel necessary for the reception of the stone used in the construction of the sea wall.

2004. A contractor who enters into a contract to construct any portion of the sea wall shall not be required to commence the work in less than thirty days after the award of the contract.

2005. The board shall, at least ten days previous to the holding of any meeting, as provided in this article, notify the Governor of the State, and the mayor of the city of San Francisco, of the time and place and object of the meeting, and request them to be present and take part. At the meeting the Governor and mayor are additional members of the board, with like powers and rights as the other members thereof, and contracts shall not be entered into under the authority of this article without the consent of either the Governor or mayor.

2006. The commissioners, and their appointees, shall not be interested in any contract for the erection or repairing of any work upon the premises under the jurisdiction of the board. Any commissioner or appointee who is so interested is guilty of a felony.

2007. Every proposal shall be accompanied by a certified check for an amount equal to five per cent of the amount of the proposal, made payable to the order of the secretary of the board. If the proposal is accepted and the contract awarded, and the bidder fails to execute the contract and give the bond required within six days after the award is made, then the sum mentioned in the check is liquidated damages for his failure, and shall be paid into the San Francisco harbor improvement fund. All contracts made pursuant to this act shall provide, under penalties of forfeiture of contract, at the option of the board, that Chinese or Mongolian labor not be employed on the work.

Article I. Extensions to Islands.

2008. The board may extend any wharf owned by the State and under the control of the board to any island within the navigable waters of the bay of San Francisco within the jurisdiction of the board, and it may lease the extension and its appurtenances for a term not to exceed twenty-five years, for an amount not less than the cost of construction. The same rules as to the lease shall be applied, in whole or in part, in payment of the cost of construction and the construction of the extension.

The lessee, his licensees and assigns, may have the right of ingress to and egress from the extension over the wharf, during the term of the lease, subject to the rules and regulations of the board.

2031. If an extension of a wharf is completed, the board shall collect the same tolls and charges for the use of any portions of the wharf as are charged or will be charged at other wharves. Any lease that is entered into shall expressly provide that tolls shall be paid on all goods moving onto, off or over the wharf and all dockage charges, rents, and other charges shall be paid for the use of any property in any way connected with or attached to the wharf or any extension thereof.

2032. The board shall not make any lease of any property under its jurisdiction which may deprive it at any time of the power to collect tolls, dockage charges and other similar port charges and any lease which is made by the board shall expressly make this reservation.

2033. Leases made pursuant to this article shall be made upon competitive bids after such public advertisements as the board deems sufficient, inviting proposals or bids therefor, and may be awarded to the person who will pay the amount required to construct the improvement, and execute and take a lease thereof for the shortest period of time, but the board may reject any and all bids.

Article 4. Construction.

2050. When the board determines that a new wharf shall be erected, or any other necessary improvement constructed, or repairs made, or dredging machines, pile drivers, scows, steam tugs, or any necessary machinery or material be obtained, the cost of which exceeds three thousand dollars, it shall advertise for sealed proposals during a period not less than ten days, in one or more of the daily newspapers in San Francisco.

2051. The advertisement shall contain a general description of the work to be done, the material to be used, the place where it is to be used, and it shall refer to specifications, which shall contain a full and accurate description of the work to be performed, the material to be used, and where it is to be used. The specifications shall be kept in the office of the secretary of the board so that all persons may inspect them during the usual business hours of all days except days of festivity and holidays.

2052. Every proposal shall be accompanied by a certified check for an amount equal to five per cent of the amount of the proposal, made payable to the order of the secretary of the board. If the proposal is accepted and the amount

10

1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is responsible for the study. The next step is to collect data. This is done by the investigator who is responsible for the study. The next step is to analyze the data. This is done by the investigator who is responsible for the study. The next step is to interpret the results. This is done by the investigator who is responsible for the study. The next step is to draw conclusions. This is done by the investigator who is responsible for the study. The next step is to report the findings. This is done by the investigator who is responsible for the study. The next step is to discuss the implications. This is done by the investigator who is responsible for the study. The next step is to write the report. This is done by the investigator who is responsible for the study. The next step is to publish the report. This is done by the investigator who is responsible for the study. The next step is to disseminate the findings. This is done by the investigator who is responsible for the study. The next step is to evaluate the process. This is done by the investigator who is responsible for the study. The next step is to improve the process. This is done by the investigator who is responsible for the study. The next step is to repeat the process. This is done by the investigator who is responsible for the study. The next step is to continue the process. This is done by the investigator who is responsible for the study. The next step is to end the process. This is done by the investigator who is responsible for the study.

1. The first of these is the fact that the United States is a free country. This means that we have the right to express our opinions and to make our own decisions. We do not have to follow the rules of other countries. We have the right to live our lives as we see fit. This is one of the great freedoms of the United States.

100

A dark, textured surface, possibly a book cover or endpaper, showing signs of wear and discoloration. The texture is grainy and uneven, with some lighter patches and darker areas. There are some small, light-colored specks and fibers visible throughout the material. The overall appearance is aged and worn.

[illegible]

shall be given by resolution of the Board of Directors of the Corporation for at least ten days before the same shall be taken. The Board of Directors shall also cause to be published in the newspapers of this city a notice of the same, and that the fees and property shall be left to the Board of Directors.

The Board of Directors shall also cause to be published in the newspapers of this city a notice of the same, and that the fees and property shall be left to the Board of Directors.

All such plans except with respect to lot boundary lines, shall be in the event of the establishment by the Board of a line upon the part of San Francisco, and the Board shall be bound to make a survey of the same, and the Board may declare the same void if it is determined that payment to the owners of the same of the value of all improvements created by the Board of the same land.

All plans made and amended within two years previous to January 15, 1890, and on file in the office of the Board of Directors of the City of San Francisco, less than fifty acres in area, and which have been made to any domestic or foreign power, for municipal facilities, a survey of the same, and the Board may declare the same void if it is determined that payment to the owners of the same of the value of all improvements created by the Board of the same land.

Article 2. Bridge Terminals

For the purpose of this article the words "bridge" shall mean the end or ending point of any boundary line, whether natural or artificial, the word "bridge" shall mean the end or ending point of any boundary line, whether natural or artificial, the word "bridge" shall mean the end or ending point of any boundary line, whether natural or artificial.

The Board of Directors shall have the right to purchase or lease any land or building, or any interest therein, for the purpose of providing a terminal for the bridge, and the Board may declare the same void if it is determined that payment to the owners of the same of the value of all improvements created by the Board of the same land.

The Board of Directors shall have the right to purchase or lease any land or building, or any interest therein, for the purpose of providing a terminal for the bridge, and the Board may declare the same void if it is determined that payment to the owners of the same of the value of all improvements created by the Board of the same land.

those of the daily papers published in San Francisco for at least ten days.

2003. The notice shall state the property, or lot or portion thereof, or land to be leased, and that bids will be received by the board at a place and time designated in the notice, and that the lots and property shall be let to the highest and best bidder.

2004. All bids for leases shall set forth the purposes for which the property shall be leased, and this statement shall be embodied in the lease given by the board, with the condition that the property shall be used for those purposes only. The board may reject any and all bids.

CHAPTER 3. REPAIR AND CONSTRUCTION.

2005. The board shall:

(a) Construct the number of wharves required by the needs of commerce, and it shall locate them at points and upon lines which it determines are most suitable for the best interests of commerce.

(b) Repair and maintain all the wharves and thoroughfares required by the needs of commerce.

(c) Erect improvements necessary for the safe loading, lashing and unloading, and protection of all classes of merchandise, and for the safety and convenience of passengers passing into and out of San Francisco by water.

2006. For the purpose of repairing the wharves the board may purchase or construct pile drivers and the necessary machinery to be used therewith, and employ men for operating them.

2007. A wharf shall not be constructed in such a manner as to leave any slip or dock to be less than one hundred thirty-six feet wide at the most narrow point between the wharves.

2008. The board may purchase or construct and repair works and machinery to preserve piers and wharves, and for this purpose it may employ men and purchase and use dynamite or other materials. The purchase of dynamite may be made without advertising for bids.

2009. A harbor embankment or sea wall shall not be constructed outside of the following named points and line commencing at the point where the eastern boundary line of the Pacific reservation, extended in a northerly direction, intersects the three-fathom contour line shown upon the chart of the United States survey, and running thence in an easterly and northerly direction, upon straight or curved lines so as to approach as near as practicable the eastern shore boundaries of the water area shown as described in Chapter

7

When the purchase of the premises under the plan of the board is effected, the joint bank or other institution authorized to act on this subject, having authority of the board.

...of the State or in connection with any

The heavy rain caused the drainage ditches to overflow and surrounding fields were flooded for the day and our trip was delayed as we waited for the rain to subside and dry.

[The page contains extremely faint, illegible horizontal lines of text, likely bleed-through from the reverse side.]

[illegible]

power to receive persons and to take care of the persons
deposed in the same manner as is now provided for the reception
or maintenance of the prisoners of the State. It is hereby
authorized to receive and maintain persons whatever nationality
with the termination of its possession and control.

CHAPTER V. GENERAL DUES.

Article I. In General.

3050. The board may set apart and use any portion of the
water front and thoroughfare for the landing and loading of
grain and other merchandise and it may erect sheds and struc-
tures for storage. A roadway of not less than twenty feet in
width on the inner side of the water front thoroughfare shall
be left open for the passage of vehicles.

The board may fix the rates and prescribe the terms and
conditions on which these sheds and structures may be used
and the board has the same control over them as over the
wharves and other piers of the water front. The board shall
not assume to limit any of the duties or obligations of the
household.

3051. The board may make streets on the water front
except for landing railroad passengers and freight and may
it may construct docks, wharves and sheds for that purpose.
The board shall require a proper rule to be laid for these
streets and structures. The distance of these streets from
docking and wharves and the wharves on merchandise and
or of the care of passing through these streets is the same as
prescribed by the general regulations of the board.

3052. The board may assign for the exclusive use of the
sanitary use of the Federal Government and its
vessels and safe landings at the officers' quarters, houses
with suitable premises near the landings for the use of the
officers of ships and shoreward to land their baggage.
The board shall make a suitable arrangement for the
for the use of the landings and safe and convenient premises.

3053. The board may also assign a suitable portion for the
use of the harbor police of San Francisco.

3054. The board may also assign a suitable place for a
housekeeping station for the exclusive use without compensation
of the quarantine and health officers of the city of San
Francisco.

3055. The board may also assign for the exclusive use of
steam boats, suitable ships in which passengers and
freight may be carried to and from the city and convenient landing
and the safe landing and delivery of freight.

3056. The board may also assign suitable premises and
or landings for the exclusive use of vessels.

[illegible]

There are two main drains in the city, one in the center of the city, and one on the east side. The center drain is the main drain, and it is the one that is most likely to be clogged. The east side drain is the one that is least likely to be clogged. The center drain is the one that is most likely to be clogged, and it is the one that is most likely to be clogged. The east side drain is the one that is least likely to be clogged, and it is the one that is least likely to be clogged.

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any and all interest in property in the United States
for a period of 30 or thirty days—previous notice

THE UNITED STATES OF AMERICA
DO hereby certify that the property made in and
for the purpose of the above described
and is not subject to the payment of any
taxes or duties.

3103. Every master, agent, or owner of any vessel, and every owner, agent, or manager of any railroad car, who discharges from or receives on or allows to be discharged from or received on the vessel or car any merchandise or other article, before the wharfage thereon has been paid, is guilty of a misdemeanor, punishable by a fine not exceeding five hundred dollars, or by imprisonment not exceeding one hundred days, or by both such fine and imprisonment.

The warrant of arrest may be discharged at any time before trial by the payment of the wharfage on the goods wrongfully discharged or received, together with the costs of the legal proceedings. A receipt for wharfage, signed by a wharfinger or other proper officer of the board is the only evidence of payment.

3104. The board may, by written permit, release a person from the obligation to deliver the statement required by this article, or to pay wharfage before the discharge or receipt of merchandise or other articles as required by this article if, before any part of the goods is discharged or received a proper and sufficient guaranty in writing is given to the board for the payment of all wharfage. This guaranty is an original obligation on the part of the guarantor, and no consideration need exist or be expressed other than the acceptance of the person.

3105. A person shall not place, or cause to be placed, any obstructions in the portion of the bay of San Francisco described in this part, nor upon any wharf or thoroughfare, without the consent of the board.

3106. Whenever any wharf or thoroughfare in the harbor of San Francisco is incumbered, or its free use is interfered with, by goods or other substance, whether loose, or built upon, or fixed to any wharf or thoroughfare, the board shall notify, in writing, the owner, agent, occupant, or person placing or keeping the obstruction thereon, to remove it within twenty-four hours after service of the notice. The notice may be served by a wharfinger, or the secretary or assistant secretary of the board.

3107. In case of failure to comply with the notice to remove the obstruction, the owner, agent, occupant, or person notified is liable to pay the board the sum of twenty-five dollars for each day during which the obstruction remains upon any wharf or thoroughfare. The board may remove any incumbering substance, and store it in a suitable, convenient, and safe place, and a sum equal to the amount of the expenses of the removal, together with all other necessary charges, shall be paid by the owner to the board, and is a lien on the substance until paid.

3108. Every person who collects any toll, wharfage, or dockage, or lands, ships, or removes any property upon or from any portion of the water front of San Francisco, or from or upon any of the wharves under the control of the board, without being by the board authorized so to do, is guilty of a misdemeanor.

3109. Every person, who, by false returns, or in any manner, avoids the payment of all or any portion of any tolls which may be due to any board of State harbor commissioners of the State of California, from any source or cause, as provided for by law and the rules and regulations of the board, is liable for and shall pay to the board twice the amount of tolls, and in addition the sum of ten dollars.

CHAPTER 9. STREETS.

3130. The board shall lay out and open along the water front line, a thoroughfare of the uniform width of two hundred feet, the inner line of which shall be parallel with the water front line, except that, its inner line between Market Street and Folsom Street shall correspond with the present line of East Street, and its inner line between Clay Street and Sacramento Street shall be a straight line drawn from the intersection of the north line of Clay Street, with the inner line of the thoroughfare to the intersection of the north line of Sacramento Street with the north line of Market Street extended, and its roadways and sidewalks shall conform to this deviation from its uniform width.

3131. The thoroughfare shall have a roadway of one hundred and eighty feet, and a sidewalk on its inner side of twenty feet in width. The roadway shall be constructed and kept in repair by the board. The sidewalk shall be constructed and kept in repair in the manner provided by law for the construction and repair of sidewalks on other streets of San Francisco.

3132. If the roadway or sidewalk is obstructed, the board shall cause the obstructions to be removed in the manner provided by this part.

The board may assign the use of spaces along the water front for offices and baggage rooms, and for scales for weighing freight, and may charge therefor a reasonable rent. The board has jurisdiction over the thoroughfare for the purposes of construction, repair, removal of obstructions, and collection of dockage, wharfage, rents, and tolls, and for commercial purposes. A franchise or privilege for a railroad track along the thoroughfare shall not be granted by the supervisors of San Francisco.

3133. The board may grant to the county of San Francisco the right to construct sewers along, through, or across any of the property under the jurisdiction of the board.

3134. The board may also acquire lands needed for the purposes of this chapter by purchase or it may exchange therefor upon an equitable basis any portion of the property of the State, under the jurisdiction of the board, lying inland of the inshore line of the thoroughfare or water front streets, or it may sell any of this inland property, and apply the proceeds to the purchase of any needed land.

A full record of the proceedings of the board in this regard shall be entered upon its minutes and a sworn statement of all exchanges, sales, purchases and other transactions shall be filed with the Secretary of State.

The statement shall show in full the payments and receipts itemized so as to exhibit definitely the price of each parcel of land transferred and in case of exchange, to describe definitely the parcels exchanged.

3135. If it is necessary to take any land for the purpose of widening any street, the board may prosecute proceedings therefor, in conformity with the provisions of Part III, Title VII, of the Code of Civil Procedure, and pay such compensation as may be assessed for the land taken. This power is concurrent with and cumulative to other powers of the board.

3136. The thoroughfare, sea wall, and contemplated streets are a public use. The right of eminent domain may be exercised by the board, in the name of the people of the State, for the estates and rights, and in the manner provided in Part III, Title VII, of the Code of Civil Procedure in the laying out and opening of this thoroughfare. The board may pay, out of the harbor improvement fund, any compensation and damages assessed in these proceedings.

3137. Whenever any section of the sea wall and thoroughfare is constructed and ready for use, the board of supervisors of the city of San Francisco, shall cause the streets of the city to be extended and constructed, so as to intersect the section; and if any such streets have been widened by the Board of State Harbor Commissioners, they shall be contracted to their original width before widening, and be so extended.

When extended, they are public streets, and their roadways and sidewalks, to the intersection of the thoroughfare, shall be constructed and kept in repair in the manner provided by law for the construction and repair of the public streets of San Francisco.

3138. The board in addition to its general jurisdiction as defined in this part, may use for loading and landing merchandise, with a right to collect dockage, wharfage and tolls thereon, any portion of the streets of San Francisco, ending or fronting upon the waters of the bay which may be so used without obstructing them as thoroughfares.

CHAPTER 10. STATE BELT RAILROAD.

3150. The board may locate, construct, maintain, operate and extend the State railroad, and railroad tracks, through, over, under and upon any State lands, or the water front or lands within its jurisdiction, or through, over, under and upon any streets, avenues, alleys, lanes, places or property of the city of San Francisco, or lands or property of the United States of America, or private property in San Francisco, in which and where it may then have a license, permission, easement or right of way therefor, together with all necessary trackage, switches, spurs, turnouts, fills, cuts, tunnels, trestles, bridges, drawbridges, signals and other appliances, appurtenances and incidents necessary to make the same complete and convenient for use.

3151. The board may obtain from Panama-Pacific International Exposition Company, a corporation, an assignment of its rights under an act of Congress approved June 28, 1912, entitled "An act granting a right of way to the Panama Pacific International Exposition Company, or such successors or assigns as may be approved by the Secretary of War, across the Fort Mason Military Reservation in California."

3152. It may also obtain the approval of the Secretary of War of such assignment, of the location of a railroad and tunnel upon and across this reservation, and of the establishment of regulations for their use.

3153. The board may construct a railroad and tunnel upon and across the reservation as a part of and incident to the State railroad. It shall impose tolls, charges and compensation for passage through the tunnel upon all freight and passenger cars which will provide, within a limited time, for the repayment of the cost of the construction of the tunnel. These tolls and charges shall be in conformity with the requirements and subject to the approval of the Secretary of War. They shall be collected until the cost of construction of the tunnel is repaid, and are exclusive of and in addition to the ordinary compensation for the use of the railroad.

3154. The board may obtain from the city of San Francisco, proper and necessary grants, licenses or permission to extend, construct, maintain and operate the State railroad along, over and upon such public streets, avenues, alleys or property of the city as are necessary for the extension of the State railroad.

3155. The board may acquire rights of way and lands necessary for such extension from the owners of private property, either by grant or by condemnation proceedings; and in that behalf the provisions of law relating to the exercise of the right of eminent domain shall apply and inure to the benefit of the board, and to such proceedings.

3156. The board may permit any person to operate passenger street cars over and through the railroad and tunnel for such time and under rules and regulations and compensation as the board determines.

3157. The board may obtain license and permission from the United States Government to extend, locate, construct, operate and maintain the railroad in and through the Presidio Reservation in the city in such location and subject to regulations prescribed by the United States Government.

3158. The board shall not construct any railroad along and upon any open canal extending inland from the water front. But it may, when a water front railroad is constructed by it, construct it across the outlet of such open canal.

3159. The board may, when the commerce of the port of San Francisco requires, maintain passenger service upon the State railroad located upon the Embarcadero in San Francisco. The board may make extensions of the service through, over, under and above the lands and water front within its jurisdiction, as public convenience and necessity require.

3160. If the establishment and maintenance of railroad passenger service is, after careful investigation, found by the board to be impracticable, or not feasible, it may establish or maintain other passenger service or the means, facilities, or modern street improvements by which or over which other passenger service can be operated and maintained by the board, or by persons authorized by the board.

3161. The board may acquire and furnish facilities which are reasonable and necessary for the accommodation of passenger traffic upon the Embarcadero.

3162. Charges for passenger service shall be determined by the board. These charges shall not be greater than are necessary to obtain revenue which, with the other revenues of the port of San Francisco, are sufficient for the maintenance of the commerce of the port, including the maintenance of the passenger service.

3163. The board may obtain added powers under existing licenses, grounds, permits or easements, and may obtain licenses, grounds, permits, or easements, necessary to secure the fulfillment of the object of this chapter.

3164. When any trainman or engineman, employed on any railroad under the control of the board, works more than eight hours in any twenty-four hours, as the employee of such railroad, he shall receive one and one-half times as much compensation for every hour more than eight as he does for each hour of the first eight.

3165. The board may lay down the number of tracks along and on any portion of the water front, which the needs of commerce may require, and it may permit their use by any person under rules, regulations, and compensation determined

by the board. The board may make agreements with persons owning spur or industry tracks relative to the use by the State of such tracks as the board may determine are necessary. Special privileges shall not be given to any person.

This section does not apply to or restrict the use of any premises leased for terminal facilities under or by reason of Chapter 171, page 194, of the Statutes of 1895, by the board. The board may permit the construction of switches leading from such railroad tracks to any warehouse or place of business.

CHAPTER 11. POLICE REGULATIONS.

Article 1. In General.

3200. Every master, agent, or owner of any vessel, who does not obey the lawful orders or directions of the chief wharfinger in any matter pertaining to the regulations of the harbor, or the removal or stationing of any vessel, is guilty of a misdemeanor, punishable by a fine not to exceed three hundred dollars, or by imprisonment not to exceed one hundred days.

3201. Every person, who deposits, or causes to be deposited, in the waters of the harbor of San Francisco, which are subject to the jurisdiction of the board, any substance which will sink and form an obstruction to navigation, without first obtaining permission, in writing, of the board, which permission shall be recorded by the secretary and shall describe, with an ordinary degree of certainty, the place where the deposit may be made, is guilty of a misdemeanor, punishable by a fine of not less than one hundred nor more than five hundred dollars, or imprisonment for not less than thirty nor more than ninety days.

3203. The municipal court of the city of San Francisco has jurisdiction to try all cases of misdemeanor arising under this part.

3204. The police commission of the city of San Francisco shall appoint as special policemen, such number of wharfingers and toll collectors as the Board of State Harbor Commissioners requests, in writing. The police commission shall furnish these special policemen with the usual badge of office, which shall be paid for by the Board of State Harbor Commissioners; the appointments shall be renewed once in each year. The jurisdiction of these special policemen is coextensive with the premises described in this part, and their terms of office.

Article 2. Quarantine.

3220. The quarantine grounds of the bay and harbor of San Francisco are at the anchorage of Sausalito.

3221. Shipmasters bringing vessels into the harbor of San Francisco, and masters, owners, or consignees having vessels

in the harbor which have on board any cases of Asiatic cholera, smallpox, yellow fever, typhus fever, or ship fever, shall report the same, in writing, to the quarantine officer before landing any passengers, casting anchor, or coming to any wharf, or as soon thereafter as they become aware of the existence of any of these diseases on board their vessels.

3222. A captain or other officer in command of any vessel sailing under a register, arriving at the port of San Francisco, and any owner, consignee, agent, or other person having charge of such vessel, shall not under a penalty of not less than one hundred nor more than one thousand dollars, land, or permit to be landed, any freight, passengers, or other persons until he has reported to the quarantine officer, presented his bill of health, and received a permit from that officer to land freight, passengers, or other persons.

3223. Every pilot who conducts into the port of San Francisco, any vessel subject to quarantine or examination by the quarantine officer, shall:

(a) Bring the vessel no nearer the city than is allowed by law.

(b) Prevent any person from leaving, and any communication being made with the vessel under his charge, until the quarantine officer has boarded it and given the necessary orders and directions.

(c) Be vigilant in preventing any violation of the quarantine laws, and report to the quarantine officer without delay, all violations that come to his knowledge.

(d) Present the master of the vessel with a printed copy of the quarantine laws, unless the master has one.

(e) If the vessel is subject to quarantine, by reason of infection, place at the masthead a small yellow flag.

3224. Every master of a vessel subject to quarantine or visitation by the quarantine officer, arriving in the port of San Francisco, who fails to do any of the following:

(a) Proceed with and anchor his vessel at the place assigned for quarantine, when legally directed so to do.

(b) Submit his vessel, cargo, and passengers to the quarantine officer, and furnish all necessary information to enable that officer to determine to what quarantine or other regulations they ought respectively to be subject.

(c) Report all cases of disease and of deaths occurring on his vessel, and to comply with all the sanitary regulations of the bay and harbor—

Is liable in the sum of five hundred dollars for each such failure.

3225. All vessels arriving off the port of San Francisco from ports which have been legally declared infected ports, and all vessels arriving from ports where there is prevailing,

at the time of their departure, any contagious, infectious, or pestilential diseases, and all vessels with decaying cargoes, or which have unusually foul or offensive holds, are subject to quarantine, and shall be, by the master, owner, pilot, or consignee, reported to the quarantine officer without delay. Such vessels shall not cross a line drawn from Meiggs' Wharf to Alcatraz Island until the quarantine officer has boarded it and given the order required by law.

3226. The quarantine officer shall board every vessel, subject to quarantine or visitation by him, immediately on its arrival, make such examination and inspection of vessel, books, papers, or cargo, or of persons on board, under oath, as he may judge expedient, and determine whether the vessel should be ordered to quarantine, and if so, the period of quarantine.

3227. A captain or other officer in command of any passenger-carrying vessel of more than one hundred and fifty tons burden, or of any vessel of more than one hundred and fifty tons burden, having passengers on board, and any owner, consignee, agent, or other person having charge of such vessels, shall not, under a penalty of not less than one hundred dollars nor more than one thousand dollars, land or permit to be landed, any passenger from the vessel until he has presented his bill of health to the quarantine officer and received a permit from that officer to land such passenger, except in cases in which the quarantine officer finds it safe to give the permit before seeing the bill of health.

3228. The following fees may be collected by the quarantine officer: For giving a permit to land freight or passengers, or both, from any sailing vessel of less than five hundred tons burden, from any port out of this State, two dollars and fifty cents; over five hundred and under one thousand tons burden, five dollars; each additional one thousand tons burden or fraction thereof, an additional two dollars and fifty cents; for steam vessels, of one thousand tons burden or less, five dollars, and two dollars and fifty cents for each additional one thousand tons burden or fraction thereof; but vessels not propelled in whole or in part by steam, sailing to and from any port of the United States, or territories, and whaling vessels, entering the harbor of San Francisco, are excepted from the provisions of this section.

3229. The board of health may enforce compulsory vaccination on passengers in infected vessels or vessels coming from infected ports.

3230. The board of health may provide suitable hospitals, to be situated at or near Sausalito, and furnish and supply them with nurses and attendants, and remove thereto all persons afflicted with cholera, smallpox, yellow fever, typhus fever, or ship fever.

3231. Every master of a vessel subject to quarantine or visitation by the quarantine officer, who fails to do any of the following:

(a) Proceed with and anchor his vessel at the place assigned for quarantine, at the time of his arrival.

(b) Submit his vessel, cargo, and passengers to the examination of the quarantine officer, and to furnish all necessary information to enable that officer to determine to what length of quarantine and other regulations they ought, respectively, to be subject.

(c) Remain with his vessel at the quarantine during the period assigned for her quarantine, and while at quarantine to comply with the regulations prescribed by law, and with such as any health officer, by virtue of authority given him by law, shall prescribe in relation to his vessel, his cargo, himself, his passengers, or crew—

Is guilty of a misdemeanor, punishable by imprisonment for not exceeding one year, or by fine not exceeding two thousand dollars, or both.

Sec. 2. Section 10004 is hereby added to the Harbors and Navigation Code, to read as follows:

10004. The following acts, together with all acts amendatory thereof and supplementary thereto, are hereby repealed.

Year	Ch.	Pg.
1851	: 49:	313
1851	: 52:	315
1857	: 98:	100
1863	: 306:	406
1863-4	: 149:	138
1863-4	: 204:	260
1863-4	: 391:	446
1865-6	: 309:	349
1865-6	: 628:	853
1867-8	: 223:	217
1867-8	: 233:	234
1867-8	: 315:	356
1867-8	: 327:	373
1867-8	: 340:	408
1867-8	: 341:	409
1867-8	: 541:	715
1869-70	: 175:	241
1869-70	: 490:	717
1869-70	: 535:	799
1871-2	: 495:	728
1871-2	: 552:	797
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Sec. 3. Section 10006 is hereby added to the Harbors and Navigation Code, to read as follows:

10006. The following sections of the Penal Code are hereby repealed:

842

843

Sec. 4. Section 10065.5 is hereby added to the Harbors and Navigation Code, to read as follows:

10065.5. The following sections of the Political Code are hereby repealed.

2520	2581	2549
2521	2532	2550
2521A	2536	2551
2522	2537	2552
2523	2538	3004
2524	2539	3013
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2525	2544	3018
2526	2545	3019
2526a	2545a	3020
2527	2546	3021
2527a	2547	3022
2528	2548	

Sec. 5. This act shall become effective if a Harbors and Navigation Code is enacted by the fifty-second Legislature.

STATE OF CALIFORNIA

State Employees' Retirement Act

Enacted, Statutes 1931, Chapter 700
Amended, Statutes 1933, Chapter 473
Amended, Statutes 1935, Chapter 152
Amended, Statutes 1935, Chapter 850
Amended, Statutes 1937, Chapter 806
Amended, Statutes 1937, Chapter 858
Amended, Statutes 1937, Chapter 859



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STATE OF CALIFORNIA

STATE EMPLOYEES' RETIREMENT ACT

Passed under authority conferred on Legislature by constitutional amendment adopted by people at election of November 4, 1930 (Art. IV, Sec. 22a).

Act approved by Governor June 9, 1931 (Stats. 1931, Ch. 700). Amendments approved by Governor May 22, 1933 (Stats. 1933, Ch. 473; Stats. 1935, Ch. 152; Stats. 1935, Ch. 850; Stats. 1937, Ch. 806; Stats. 1937, Ch. 858; Stats. 1937, Ch. 859).

An act to provide for the creation, establishment, and adjustment with other such systems, of a retirement system for employees of the State of California, and make an appropriation therefor.

[Amended, Statutes 1933, Chapter 473.]

The people of the State of California do enact as follows:

SECTION 1. The purpose of this act is to effect economy and efficiency in the public service by providing a means whereby employees who become superannuated or otherwise incapacitated may, without hardship or prejudice, be replaced by more capable employees, and to that end providing a retirement system consisting of retirement compensation and death benefits.

Definitions

SEC. 2. The following words and phrases used in this act, unless a different meaning is plainly indicated in the context, shall have the following meanings:

SEC. 3. "Retirement system" shall mean the "State Employees' Retirement System" created by section 25 of this act;

SEC. 4. "Employee" shall mean any person in the employ of the State of California whose compensation, or at least that portion of such compensation which is provided by the State, is paid out of funds directly controlled by the State, and, for the purpose of this act, any person in the employ of the university whose compensation, or at least that portion of such compensation which is provided by the university, is paid out of funds directly controlled by the university, excluding all other political subdivisions, municipal, public and quasi public corporations; in addition to other funds so controlled, funds deposited in the State treasury and disbursed therefrom in payment of compensation, regardless of the source from which they were derived, shall be considered as directly controlled by the State for the purposes of this section;

[Amended, Statutes 1933, Chapter 473.]

[Amended, Statutes 1937, Chapter 806.]

SEC. 5. "Member" shall mean any person included in the membership of the retirement system set forth in sections 26, 27, 28 and 28a, and not excluded in sections 29 to 40, inclusive, of this act;

[Amended, Statutes 1935, Chapter 850.]

SEC. 6. "Board" shall mean the "Board of Administration" created in this act;

SEC. 7. "Retirement fund" shall mean the "State employee retirement fund" created and established in section 41 of this act;

SEC. 8. "State service" shall mean service rendered as an employee or officer, appointed or elected, of the State for compensation and, for the purposes of this act, a member shall be considered as being in the "State service" only while he is receiving compensation from the State for such service, except as provided in section 47 hereof;

[Amended, Statutes 1935, Chapter 152.]

SEC. 8a. "Highway patrol service" shall mean service rendered as a member of the California Highway Patrol, or as a member, on or after September 1, 1923, of the highway patrol of any county. For the purpose of this act, a member shall be considered as being in the "highway patrol service" only while he is receiving compensation from the State or county for such service, except as provided in section 47 hereof;

[Added, Statutes 1937, Chapter 858.]

[Amended, Statutes 1937, Chapter 859.]

SEC. 9. "Prior service" shall mean the State service, as defined herein, rendered before the first day of January, 1932, and allowable as provided in section 49 of this act;

[Amended, Statutes 1933, Chapter 473.]

SEC. 10. "Continuous service" as applied to "prior service" shall mean all prior service, regardless of interruptions in such service, and as applied to service as a member shall mean uninterrupted employment by the State, except as provided in section 47 hereof, and, except that when for any cause whatever, a member discontinues State service but subsequently reenters such service within three years from the date of the discontinuance, such interruption shall not be deemed to break the continuity of service;

[Amended, Statutes 1935, Chapter 152.]

SEC. 11. "Beneficiary" shall mean any person in receipt of pension, annuity, retirement allowance, death benefit or any other benefit provided by this act;

SEC. 12. "Compensation" shall mean the remuneration paid in cash out of funds controlled by the State plus the monetary value, as determined by the Board of Administration, of board, lodging, fuel, laundry and other advantages of any nature furnished by the State to a member in payment for his services;

SEC. 13. "Compensation earnable" by a member shall mean the average monthly compensation as determined by the board upon the basis of the average time put in by members in the same group or class of employment and at the same rate of pay, it being assumed that during any absence said member was in the position held by him at the beginning of the absence and that prior to entering State service he was in the position first held by him in such service, but such "compensation earnable" shall not exceed four hundred sixteen dollars and sixty-six cents per month;

[Amended, Statutes 1935, Chapter 850.]

SEC. 14. "Final compensation" shall mean the average annual compensation earnable by a member during the five years immediately preceding his retirement;

SEC. 15. "Regular interest" shall mean interest at four per centum per annum, compounded at each June thirtieth, subject to section 51 hereof, plus such additional interest as the board may credit from year to year in accordance with the provisions of this act;

[Amended, Statutes 1933, Chapter 473.]

[Amended, Statutes 1937, Chapter 806.]

SEC. 16. "Normal contributions" shall mean contributions by members under the provisions of sections 65 to 67, both inclusive, of this act;

[Amended, Statutes 1937, Chapter 806.]

SEC. 17. "Additional contributions" shall mean contributions by members under the provisions of section 68 of this act;

SEC. 18. "Accumulated normal contributions" shall mean the sum of all the normal contributions standing to the credit of a member's individual account, together with the regular interest thereon;

SEC. 19. "Accumulated additional contributions" shall mean the sum of all the additional contributions standing to the credit of a member's individual account, together with regular interest thereon;

SEC. 20. "Accumulated contributions" shall mean accumulated normal contributions plus any accumulated additional contributions standing to the credit of a member's account;

SEC. 21. "Pension" shall mean payments for life derived from contributions made from State controlled funds as provided in this act;

SEC. 22. "Annuity" shall mean payments for life derived from contributions made by a member as provided in this act;

SEC. 23. "Retirement allowance" shall mean the pension plus the annuity;

SEC. 23a. "Death allowance" shall mean payments for life, or until remarriage, or until the youngest child shall attain the age of eighteen years, as provided in section 100 hereof;

[Added, Statutes 1937, Chapter 806.]

SEC. 23b. "Actuarial equivalent" shall mean a benefit of equal value when computed upon the basis of such mortality tables as shall be adopted by the board, and interest at the rate of four per centum per annum, compounded annually, subject to section 51 hereof; and

[Added, Statutes 1937, Chapter 806.]

SEC. 24. "Fiscal year" shall mean any year commencing with July first and ending with June thirtieth next following.

SEC. 25. A retirement system is hereby created and established to become effective January 1, 1932, and to be known as the "State Employees' Retirement System."

Membership

SEC. 26. Except as herein expressly excluded from membership all employees shall become members of the retirement system as follows:

SEC. 27. From and after the date this system becomes effective,

every employee who has rendered one-half year of continuous service is a member of the retirement system, and every other employee shall become a member after the completion of six months of State service uninterrupted by a break of more than one month, provided that an employee who has entered or enters State service after January 1, 1933, as the result of the assumption by the State of a governmental function previously exercised by a political subdivision thereof and under which function he was employed for at least such six months' period immediately preceding such assumption, shall be considered a member of the system and after the date of said entry into State service.

[Amended, Statutes 1933, Chapter 473.]

SEC. 28. Every employee who reenters State service after the date this system becomes effective, and who, prior to such reentry has completed six months of State service, uninterrupted by a break of more than one month, shall become a member of the retirement system upon such reentry.

[Amended, Statutes 1933, Chapter 473.]

SEC. 28a. Persons who are members of the California Highway Patrol become and remain members of the retirement system in the same manner as in the case of other eligible State officers or employees except that when any such person is disabled or killed by injury or illness arising out of and in the course of such duties, such person, in respect to such disability or death, is deemed a member of the retirement system while in State service prior to the completion of the six months of service referred to in section 27, to the same extent as if such six months of service were completed prior to such disability or death.

"Member of the California Highway Patrol," and "member of the highway patrol of a county," for the purpose of the retirement system, includes persons employed in the Motor Vehicle Department or by a county in connection with its highway patrol function, respectively, whose principal duties consist of active law enforcement service and excludes such persons whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise clearly not falling within the scope of active law enforcement service, even though such person is subject to occasional call, or is occasionally called upon, to perform duties within the scope of active law enforcement service.

[Added, Statutes 1935, Chapter 850.]

[Amended, Statutes 1937, Chapter 858.]

Exemptions from Membership

SEC. 29. The following employees shall not become members of the retirement system:

SEC. 30. Elective officers, provided that any person so excluded from membership, who later becomes a member hereof, shall have the option of making contributions to the retirement system in the amount which he would have contributed had he not been so excluded, and shall then receive credit for prior service in the same manner as if he had not been so excluded. If he shall affirmatively exercise the option

the contributions of the State because of his membership, shall be the same as they would have been had he not been so excluded.

[Amended, Statutes 1937, Chapter 806.]

SEC. 31. Inmates of State institutions who are allowed compensation for such service as they are able to perform;

SEC. 32. Persons in State institutions principally for the purpose of training, but who receive compensation;

SEC. 33. Persons employed under contract for a definite period and for the performance of specific duties requiring professional or high technical skill;

SEC. 34. Employees serving on a part-time basis;

SEC. 35. Persons in State service on June 30, 1933, or prior thereto, whose compensation equals or exceeds four hundred sixteen dollars and sixty-six cents per month, and who file or have filed, with the Board of Administration an election not to become members;

[Amended, Statutes 1933, Chapter 473.]

SEC. 36. Persons directly appointed, without the nomination of any officer or board, by the Governor, and who do not file with the Board of Administration an election in writing to become members;

SEC. 37. All public school teachers who fall within the provisions of any teachers' retirement system except teachers in schools entirely or partially supported by State controlled funds, and whose entire compensation for full time teaching is paid directly to them by the State, at least fifty per cent of such compensation coming out of State appropriations;

SEC. 38. Persons who, if the retirement system did not exist, would be subject to the provisions of Part IV of Division V of the School Code and who file requests for exemption with the board within ninety days after becoming employed in a status in which they will become eligible for membership in the retirement system.

Any person who was employed in a position which, if the retirement system had not existed, would have been subject to the provisions of Part IV of Division V of the School Code, but who was by the provisions of this act made a member of the retirement system, may withdraw from the retirement system and again become subject to the provisions of Part IV of Division V of the School Code by filing an election so to do with the Board of Administration on or before December 31, 1933. Upon the receipt of such election by the Board of Administration, said person shall cease to be a member of the retirement system and shall become subject to the provisions of Part IV of Division V of the School Code. Said person, solely for the purposes of section 75 of this act, shall be considered as permanently separated from State service. The Public School Teachers Retirement Salary Fund Board shall count as part of the service required for retirement under Part IV of Division V of the School Code, service rendered by such person as a member of the retirement system, and also service rendered by such person as a member of the retirement system whose termination of membership therein results from separation from State service because of the abolition of the position he holds in State service, if such service would have been so counted had not the act creating the retirement

system become effective, and if, also, such person pays to the said retirement salary fund the amounts he would have paid had he never been a member of the retirement system.

[Amended, Statutes 1933, Chapter 473.]

SEC. 38a. All State employees coming within the meaning of the act, who are beneficiaries under the pension and retirement annuity system of the University of California.

[Amended, Statutes 1933, Chapter 473.]

SEC. 38b. Persons who are members of any other retirement pension system supported wholly or in part by funds of the United States Government, any State government or political subdivision thereof and who are receiving credit in such other system for service it being the purpose of this section to prevent a person from receiving credit for the same service in two retirement systems supported wholly or in part by public funds, and no person shall receive such credit under any circumstance. Any member of the retirement system who, because of his employment by the State, shall be required to become a member of any such other system, shall be considered solely for the purposes of section 75 of this act as permanently separated from State service. The accumulated contributions of any member who shall be required after becoming a member of such other system and before receiving said accumulated contributions, shall be paid to the beneficiary nominated by him to receive any death benefit payable under section 100 hereof. Contributions to the retirement fund under sections 108 and 109 hereof on the basis of compensation earned by members at the effective date of termination of membership herein because of membership in such other system, shall be repaid to the fund from which said contributions were made.

For the purpose of this section, persons who merely are receiving pensions or retirement allowances, or other payments, from any source whatever, on account of service rendered to other than the State when such persons were not in State service, shall not be considered because of such receipt, members of any other retirement or pension system.

[Added, Statutes 1933, Chapter 473.]

[Amended, Statutes 1937, Chapter 806.]

Change of Status

SEC. 39. It shall be the duty of the head of each office or department to give immediate notice in writing to the Board of Administration of the change in status of any member in his office or department resulting from transfer, promotion, leave of absence, resignation, retirement, statement, dismissal or death. The head of each office or department shall furnish such other information concerning any member as the board may require.

Termination of Membership

SEC. 40. Each member and each person retired shall be subject to all the provisions of this act and to the rules and regulations adopted by the Board of Administration. Any person who is retired and any person who is credited with less than twenty years of State service

who renders less than five years of service in any period of ten consecutive years, or withdraws more than one-fourth of his normal contributions, ceases to be a member.

[Amended, Statutes 1933, Chapter 473.]

[Amended, Statutes 1935, Chapter 152.]

Fund Created

SEC. 41. A fund is hereby created and established to be known as the "State employees' retirement fund" and shall consist of all the cash, securities or other assets paid into it in accordance with the provisions of this act.

Board of Administration Created

SEC. 42. A board of administration of said retirement system is hereby created, consisting of one member of the State Personnel Board other than the Director of Finance, to be selected by and to serve at the pleasure of the State Personnel Board, the Director of Finance, three members elected, under the supervision of the board of administration, from the active members of the retirement system, which shall not include retired members, an official of a life insurance company and an officer of a bank who shall be appointed by the Governor within thirty days of the taking effect of this act. In the election of the three members from the active members of the system, the ballots cast shall be delivered to and canvassed by the Secretary of State. The term of office of the five members, other than ex officio members, shall be four years expiring on January fifteenth, and the present terms of said five members, regardless of whether said terms be filled, shall be unchanged by this section. Vacancies shall be filled by appointment by the Governor, from the class in which the vacancy occurs and for the unexpired term or until the election, prior to the expiration of the term, of an active member of the retirement system to fill the vacancy, if it shall have occurred in that class.

[Amended, Statutes 1935, Chapter 152.]

SEC. 43. The board may establish such rules and regulations as it deems proper; shall elect one of its members president, and shall appoint and fix the compensation of a secretary, who shall have the power to administer oaths, and other necessary employees in accordance with the classifications made by the Civil Service Commission. It shall maintain its office in the city of Sacramento. All expenses of the administration of this act shall be a charge on the general fund of the State. The members of the board shall serve without compensation, but they shall be reimbursed for actual and necessary expenses incurred through service on the board out of the appropriation for the administration of this act.

[Amended, Statutes 1937, Chapter 806.]

SEC. 44. The board shall determine who are employees within the meaning of this act and shall be the sole authority and judge under this act as to the conditions under which persons may be admitted to and continue to receive benefits under the retirement system and shall have exclusive control of the administration and investment of the

retirement fund. As soon as practical after the close of each fiscal year it shall file with the Governor a report of its work for such fiscal year.

[Amended, Statutes 1933, Chapter 473.]

SEC. 45. Subject to the following and to all other provisions of this act, and such rules and regulations as it may adopt in pursuance thereof, the board shall determine and may modify allowances for service and disability.

Year of Service

SEC. 46. It shall fix and determine how much service rendered in any fiscal year shall be the equivalent of a year of service and parts thereof, but shall credit one year for two hundred fifty or more days of service rendered by employees on a per diem basis and one year for ten months or more of service rendered by employees on a monthly basis, but not more than one year for all service in any fiscal year.

Absence from Service

SEC. 47. Time during which a member is absent from State service without compensation shall not be allowed in computing service; except that time during which a member is absent from State service by reason of service in the military or naval forces of the United States in any war involving the United States as a belligerent, or in other national emergency, shall be considered as time spent in State service, for the sole purpose of qualification for retirement, but not calculation of benefits, under the retirement system. Any member so absent shall have the right to contribute to said system, at times and in a manner fixed by the board of administration, amounts equal to the contributions which would have been made to the system by both him and the State on the basis of his compensation earnable during the time he is so absent. If he does so contribute, he shall receive credit for State service for such time in the same manner as if he had not been absent from State service.

[Amended, Statutes 1935, Chapter 152.]

SEC. 48. Each employee shall file with the Board of Administration such information affecting his status as a member of the retirement system as the board may require.

Prior Service

SEC. 49. Credit for prior service shall be granted to each person who has rendered such service as defined in this act, and who has become a member of the retirement system on January 1, 1932, or within three years after last rendering prior service, the prior service credited, however, to be one-half year less than the total prior service rendered by him. Prior service so credited shall be the basis for a retirement allowance or benefit as provided in this act only if the membership in the retirement system continues unbroken until retirement on a retirement allowance or until the granting of such other benefit, provided that termination of membership by withdrawal of accumulated contributions followed by the redeposit of such contribu-

tions upon reentrance into State service as herein provided shall not constitute a break in membership, but this section shall not be construed to entitle any person to credit as prior service for time during which he was not in State service as defined in this act.

[Amended, Statutes 1933, Chapter 473.]

Board of Administration—Powers and Duties

SEC. 50. The management and control of the retirement system shall be vested in the Board of Administration, and it shall exercise the following powers and perform the following duties:

SEC. 51. It shall keep in convenient form such data as shall be necessary for the actuarial valuation of the retirement fund created by this act. On July 1, 1932, and at the end of every four-year period thereafter, it shall cause to be made an actuarial investigation into the mortality, service and compensation experience of the members and beneficiaries under the provisions of this act, and shall further cause to be made an actuarial valuation of the assets and liabilities of the retirement fund herein created, and from time to time shall determine the rate of interest being earned on the retirement fund. Upon the basis of such investigation, valuation, and determination, said board shall adopt such mortality, service and other tables and such interest rate, in lieu of the interest rate specified herein, or any of such items as it shall deem necessary, and shall make such revision in rates of contribution of members as it may deem necessary to comply with the provisions of sections 65 and 65a hereof. No adjustment shall be included in the new rates for time prior to the effective date of such revision.

[Amended, Statutes 1937, Chapter 806.]

SEC. 52. It shall credit contributions of members, of beneficiaries and of the State with interest at the rate of four per centum per annum, compounded at each June thirtieth, subject to section 51 hereof. At the end of each fiscal year, beginning with the second fiscal year of the operation of the retirement system, it may credit to all contributions held in the retirement fund at June thirtieth of the then current fiscal year, such interest in excess of the four per centum provided herein as it may deem proper in the light of the earnings on the retirement fund during such fiscal year, but such additional interest credited during any fiscal year shall not be greater than the excess of said earnings over the interest otherwise credited to contributions during that year. Interest at the rate of four per centum per annum, compounded annually, subject to section 51 hereof, shall be used in the calculation of benefits under any mortality table adopted by the board, regardless of any additional interest allowed on contributions under this paragraph.

[Amended, Statutes 1937, Chapter 806.]

SEC. 53. In addition to other records and accounts, it shall keep such records and accounts as may be necessary to show at any time:

SEC. 54. The total accumulated contributions of members;

SEC. 55. The total accumulated contributions of retired members less the annuity payments made to such members;

SEC. 56. The accumulated contributions of the State held for the benefit of members on account of service rendered as members of the retirement system;

SEC. 57. All other accumulated contributions of the State, which shall include the amounts available to meet the obligation of the State on account of benefits that have been granted to retired employees and on account of prior service of members;

SEC. 58. In addition to rendering the annual report to the Governor required by section 44 of this act, it shall cause to be published annually a financial statement showing an actuarial valuation of the assets and liabilities of the retirement system created by this act and a statement as to the accumulated cash and securities in the retirement fund as certified by the State Controller, but until all prior service is verified, the Board of Administration may omit from the financial statement published annually, assets and liabilities resulting from such prior service, and may include assets and liabilities on account of service rendered as members in amounts equal only to accumulated contributions held on account of such service.

[Amended, Statutes 1933, Chapter 473.]

SEC. 59. The retirement fund shall be managed as follows:

SEC. 60. The Board of Administration shall have exclusive control of the administration and investment of said fund, subject to the restriction that no investment shall be made except upon the affirmative vote of the Director of the Department of Finance and at least three other members of the Board of Administration, and subject also to the terms, conditions, limitations and restrictions imposed by the laws of the State of California upon savings banks in the making of investments by savings banks.

SEC. 61. The Board of Administration shall deposit monthly in the State treasury all amounts received by it as provided in section 44.

SEC. 62. The State Treasurer shall be the custodian of the retirement fund, subject to the exclusive control of the Board of Administration as to the administration and investment thereof. All payments from said fund shall be drawn from the fund upon warrants drawn by the Controller of the State, upon demands made by the Board of Administration.

SEC. 63. Interest earned on any cash deposit in a bank by the State Treasurer and income on other assets constituting a part of the said fund shall be paid into said fund as received. Income, of whatever nature, earned on the retirement fund during any fiscal year, in excess of the interest credited to contributions during said year shall be retained in said fund as a reserve against deficiencies in interest earned in other years, losses under investments, and other contingencies.

[Amended, Statutes 1937, Chapter 806.]

Borrowing Prohibited

SEC. 64. Except as herein provided, no member and no employee of the Board of Administration shall have any interest, direct, indirect, in the making of any investment, or in the gains or profits accruing therefrom. And no member or employee of the said board directly or indirectly, for himself or as an agent or partner of other

shall borrow any of its funds or deposits, nor shall any such member or employee in any manner use the same except to make such current and necessary payments as are authorized by said board; nor shall any member or employee of said board become an indorser or surety as to, or in any manner an obligor for investments by the board.

Rates of Contribution

SEC. 65. The normal rates of contribution of members, other than members of the California Highway Patrol, shall be based on sex and age at the nearest birthday at the time of entrance into the retirement system. The normal rates of contribution shall be such as will provide an average annuity at age sixty-five equal to one one-hundred fortieth of the final compensation of members, according to the tables adopted by the board, for each year of service rendered after entering the system. Nothing in this section shall prevent the adoption of one schedule of rates for males and one schedule for females.

[Amended, Statutes 1935, Chapter 850.]

[Amended, Statutes 1937, Chapter 806.]

SEC. 65a. The normal rates of contribution of each member, who is also a member of the California Highway Patrol, shall be based on his age at July 1, 1935, or at his later entrance into the retirement system, and his age when he entered highway patrol service, both ages being taken to the next lower completed quarter year. The age at entrance into the highway patrol service, if said entrance was prior to July 1, 1935, shall be determined by deducting the total of such service credited to the member at July 1, 1935, from his age at that date. The normal rates of contribution of each such member who entered highway patrol service at or below age forty-five shall be such as, on the average for such member, if his service on full salary be uninterrupted and when accumulated with regular interest; added to the equal accumulated contributions of the State and applied according to the tables adopted by the board will provide a retirement allowance upon retirement for service at the age of sixty years, or upon completion of twenty years of service at an age higher than sixty years, equal to one-half of his final compensation, less that part of the retirement allowance set forth in section 83a, which is to be provided by contributions of the State on account of service rendered prior to January 1, 1932, if such member affirmatively exercises the option in section 65d; otherwise, less a pension calculated in the same manner as the pension in section 83a, but on the basis of highway patrol service rendered by him prior to July 1, 1935. If such member entered highway patrol service at an age greater than forty-five years, then his normal rate of contribution shall be such as will provide an average annuity at age sixty-five equal to one-eightieth of his final compensation, according to tables adopted by the board, for each year of service after July 1, 1935, or after entrance into the retirement system if he affirmatively exercises the option in section 65d. The normal rate of contribution of any member who received credit for service rendered as a member of the highway patrol of a county in California, shall be adjusted in such manner as may be necessary to comply with this section.

[Added, Statutes 1935, Chapter 850.]

[Amended, Statutes 1937, Chapter 858.]

SEC. 65b. If a member ceases to be a member of the California Highway Patrol and continues to be a member of the retirement system in a different employment status, or if the reverse be true, then the accumulated contributions standing to his credit or redeposited by him shall remain in his individual account, and the rate of his contribution thereafter shall be the normal rate provided herein for persons in his new group or class of employment and at his age when he first became a member, subject to section 76 hereof in the event he did not redeposit accumulated contributions withdrawn from the system.

[Added, Statutes 1935, Chapter 850.]

[Amended, Statutes 1937, Chapter 806.]

SEC. 65c. The Board of Administration shall adopt normal rates of contribution of members to comply with the provisions of sections 65 and 65a hereof, and said rates shall remain in full force and effect until revised by said board as provided in section 51 hereof.

The actual amount of annuity receivable by any member upon retirement shall be the actuarial equivalent of his accumulated contributions, as provided in sections 81 and 87.

[Added, Statutes 1935, Chapter 850.]

[Amended, Statutes 1937, Chapter 806.]

SEC. 65d. The rates of contribution provided for in section 65c for members of the California Highway Patrol shall apply on and after July 1, 1935. Each of such members, however, shall have the option, to be exercised on or before December 31, 1937, of contributing a sum sufficient to make the amount of the accumulated contributions standing to his credit on that date the same as such amount would have been had he been contributing at the rate, from and after the effective date of his membership in the retirement system, which would have applied to him at such effective date if said rates for the highway patrol had been then in effect. If such option is affirmatively exercised, then the rate of contribution for such member on and after July 1, 1935, shall be based on his age at such effective date and his age at the date of entrance into highway patrol service.

[Added, Statutes 1935, Chapter 850.]

[Amended, Statutes 1937, Chapter 858.]

SEC. 66. The normal rate of contribution established for age sixty-four shall be the rate for any member who has attained a greater age before entrance into the retirement system. In like manner the normal rate of contribution established for age sixteen shall be the rate for any member who enters the retirement system at a lesser age.

Normal Contribution

SEC. 67. The Board of Administration shall certify to the head of each office or department of the State and to the comptroller of the university the normal rate of contribution as provided in this act for each member in such office, department, or the university respectively. The head of each office or department of the State shall apply such rate of contribution to so much of the compensation of each member as does not exceed four hundred sixteen dollars and sixty-six cents per month and shall certify to the State Controller on each and every pay roll the amount to be contributed and shall furnish immediately to the

Board of Administration a copy of each and every such pay roll; and each such amount shall be deducted by the head of each office or department and shall be remitted to the board. The comptroller of the university shall apply the rate of contribution certified to him by the board to so much of the compensation of each member employed by the university as does not exceed four hundred sixteen dollars and sixty-six cents per month, and the contributions so determined shall be deducted by the comptroller of the university from the compensation of each such member; each such amount shall be remitted to the board and the comptroller of the university shall furnish to the board a copy of each and every salary roll and pay roll from which such amounts have been deducted. Each contribution deducted and remitted to the board shall be credited by the board, together with regular interest, to an individual account of the member for whom the contribution was made. Payment of salaries or wages less such contribution shall be full and complete discharge and acquittance of all claims and demands whatsoever for the service rendered by members during the period covered by such payment, except their claims to the benefits to which they may be entitled under the provisions of this act.

[Amended, Statutes 1937, Chapter 806.]

Additional Contribution

SEC. 68. Subject to the rules and regulations to be established and promulgated by the Board of Administration, any member may elect to contribute at rates in excess of those provided for in section 65 of this act, for the purpose of providing additional benefits, but the exercise of this privilege by a member shall not place on the State any additional financial obligation. The provisions of section 67, next preceding, shall apply also to additional contributions. The board, upon application, shall furnish to such member information concerning the nature and amount of additional benefits to be provided by such additional contributions.

[Amended, Statutes 1933, Chapter 473.]

SECS. 69, 70, 71, 72, 73 and 74. [Repealed, Statutes 1933, Chapter 473. The intent of these sections is included in sections 108, 109 and 109a as amended by Chapter 473, Statutes of 1933.]

Refund of Contribution

SEC. 75. Should the State service of a member be discontinued otherwise than by death or retirement, he shall, six months after the date of discontinuance, be paid such part of his accumulated contributions as he demands, except that if the member is credited with less than twenty years of State service and, in the opinion of the Board of Administration, is permanently separated from State service by reason of such discontinuance, he shall be paid forthwith all of his accumulated contributions. The board may, in its discretion, withhold for not more than one year after a member last rendered State service all or part of his accumulated normal contributions if after a previous discontinuance of State service he withdrew all or a part of his accumulated normal contributions and failed to redeposit such withdrawn amount in the retirement fund as provided in section 76.

[Amended, Statutes 1935, Chapter 152.]

Redeposit of Withdrawn Contributions

SEC. 76. Any member may redeposit in the retirement fund, in one sum or in not to exceed six monthly or twelve semimonthly payments, an amount equal to that which he withdrew therefrom at the last termination of his membership. If a member, upon reentering the retirement system after a termination of his membership, does not make such redeposit, he shall reenter as a new member without credit for any service and the rate of his contribution for future years shall be the normal rate provided for in this act at his age of reentrance; otherwise his rate of contribution for future years shall be the same as his rate prior to the last termination of his membership, and his membership shall be the same as if unbroken by such last termination.

[Amended, Statutes 1937, Chapter 806.]

SEC. 77. Retirement of a member for service shall be made by the Board of Administration as follows:

Compulsory Service Retirement

SEC. 78. From and after January 1, 1933, until January 1, 1937, every member shall be retired on the first day of the calendar month next succeeding that in which he attains the age of seventy-five years. On or after January 1, 1937, every member who is also a member of the California Highway Patrol, and who at that time has attained the age of sixty-five years shall be retired forthwith, and thereafter every such member must be retired on the first day of the calendar month next succeeding that in which he attains the age of sixty-five years. On and after January 1, 1937, every other member who at that time has attained the age of seventy years shall be retired forthwith, and thereafter every such other member must be retired on the first day of the calendar month next succeeding that in which he attains the age of seventy years.

[Amended, Statutes 1935, Chapter 850.]

Voluntary Service Retirement

SEC. 79. Upon attaining the age of sixty or more years and completing twenty years of continuous State service credited under this act, among which must be included one year of service after becoming a member of the retirement system, any member may be retired upon written application to the board.

[Amended, Statutes 1933, Chapter 473.]

[Amended, Statutes 1937, Chapter 806.]

Service Retirement Allowance

SEC. 80. A member upon retirement from service, is entitled to receive a service retirement allowance which shall consist of:

SEC. 81. An annuity which shall be the actuarial equivalent of his accumulated contributions at the time of his retirement;

SEC. 82. A pension, purchased by the contributions of the State, equal to that portion of the annuity purchased by the accumulated normal contributions of the member; and

SEC. 83. An additional pension for members other than members of the California Highway Patrol, purchased by the contributions of

the State. Such additional pension shall be equal to one-seventieth of the average annual compensation earnable by him during the three years ending December 31, 1931, multiplied by the number of years of prior service credited to him, except that if a member retires before attaining the age of sixty-five years, the additional pension shall be reduced to that amount which the value of the pension computed as provided in this paragraph as deferred to age sixty-five, will purchase at the actual age of retirement.

[Amended, Statutes 1933, Chapter 473.]

[Amended, Statutes 1935, Chapter 850.]

SEC. 83a. An additional pension for members who are also members of the California Highway Patrol, purchased by contributions of the State. Such additional pension shall be the same percentage of his final compensation, regardless of his age at retirement, for each year of highway patrol service rendered by him prior to January 1, 1932, as the contributions of the member and the State are calculated to provide upon retirement for service at sixty years of age or upon completion of twenty years of service at an age higher than sixty years or upon retirement with less than twenty years of service at age sixty-five, for each year of such service after said date.

[Added, Statutes 1935, Chapter 850.]

[Amended, Statutes 1935, Chapter 858.]

Minimum Guarantee

SEC. 84. When a member enters the retirement system with credit for prior service, and retires after attaining the age of seventy years, if his final compensation was such that one-half thereof is in excess of the total of his pension, annuity, and additional pension for prior service, a second additional pension for prior service sufficient to cause his retirement allowance to amount to one-half of such final compensation shall be paid him on account of prior service, but in no event shall a greater second additional pension be paid than will cause the total retirement allowance, exclusive of the annuity provided by his accumulated additional contributions, to amount to the sum of four hundred eighty dollars per year.

SEC. 84a. This section repealed by Chapter 858, Statutes of 1937.

Disability Retirement

SEC. 85. Any member who is also a member of the California Highway Patrol shall be retired for disability regardless of age or amount of service, if incapacitated for the performance of duty as the result of an injury or disease arising out of and in the course of his employment. Incapacity for performance of duty shall be determined by the Board of Administration, but the Industrial Accident Commission shall determine, in the same manner as for all other State employees, whether such incapacity is the result of injury or disease arising out of and in the course of employment. Any such member incapacitated for the performance of duty by reason of a cause not included in the immediately preceding sentence, and any other member so incapacitated, regardless of the cause, shall be retired regardless of age but only after ten years of service to the State.

[Amended, Statutes 1935, Chapter 850.]

SEC. 85a. Subject to the requirements as to service and cause of disability stated in section 85 and upon the application of a member or upon the application of the head of the office or department in which such member is or was last employed, or any other person on behalf of such member, while such member is in State service, within four months after such member's discontinuance of State service, or while such member continuously, from the date of discontinuance of State service to the time of the application or motion, is physically or mentally incapacitated to perform his duties, may apply for, or the board upon its own motion may order, a medical examination to determine the existence of such incapacity. Upon the receipt of such application, the board shall order such medical examination. If the medical examination shows to the satisfaction of the board, that the member is permanently incapacitated physically or mentally for the performance of his duties in the State service, the board shall forthwith retire the member for disability. The board shall secure such medical service and advice as is necessary to carry out the purpose of this section and of sections 90 to 94, inclusive, of this act, and shall pay for such medical services and advice such compensation as the board deems reasonable.

[Added, Statutes 1935, Chapter 850.]

Disability Retirement Allowance

SEC. 86. Upon retirement for disability, a member who is not a member of the California Highway Patrol and who has attained the age of sixty years shall receive a service retirement allowance as provided in sections 81 to 83a, inclusive, of this act. Upon retirement of a member, who is also a member of the said highway patrol, for disability resulting from injury or disease arising out of and in the course of employment, such member shall receive a retirement allowance of fifty per centum of his final compensation or, if he qualified as to age and service for service retirement under section 79, then such member shall receive a service retirement allowance as provided in sections 81 to 83, both inclusive. The allowance shall be provided by the contributions of the member and of the State in the same manner but not in the same amounts as is set forth in sections 87 and 88 for other disability retirement. Every other member retired for disability shall receive a retirement allowance which shall consist of:

[Amended, Statutes 1935, Chapter 850.]

SEC. 87. An annuity which shall be the actuarial equivalent of his accumulated contributions at the time of his retirement; and

SEC. 88. If, in the opinion of the Board of Administration, such disability is not due to intemperance, wilful misconduct or violation of law on the part of the member, a pension purchased by the contributions of the State, which, together with his annuity provided by his accumulated normal contributions, shall make the retirement allowance, exclusive of the annuity provided by his accumulated additional contributions, equal to (a) ninety per cent of one-seventieth of his final compensation multiplied by the number of years of service credited to him, if such disability retirement allowance exceed one-fourth of his final compensation; otherwise, (b) ninety per cent of one-seventieth of his final compensation multiplied by the number of years of service

which would be creditable to him were his service to continue until attainment by him of age sixty-five, but in such case the retirement allowance shall not exceed one-fourth of such final compensation. In no event, however, shall the pension purchased by the contributions of the State be more than sufficient to make the disability retirement allowance, exclusive of the annuity provided by accumulated additional contributions, exceed the service retirement allowance, exclusive of any annuity purchased by accumulated additional contributions, receivable by the member should he retire at the lowest age at which he would be eligible for service retirement.

[Amended, Statutes 1933, Chapter 473.]

SEC. 89. If, in the opinion of the board, the disability is due to intemperance, wilful misconduct or violation of law, on the part of the member, and the annuity to which said member is entitled under sections 86 to 88, inclusive, of this act, is less than two hundred forty dollars per year, the Board of Administration, in its discretion, may pay to said member, in one lump sum and in lieu of said annuity, his accumulated contributions.

Safeguards on Disability Retirement

SEC. 90. The Board of Administration, may, at its pleasure require any disability beneficiary, under the age of sixty, to undergo medical examination. Such examination shall be made by a physician or surgeon, appointed by the board, at the place of residence of said beneficiary or other place mutually agreed upon. Upon the basis of such examination the board shall determine whether said disability beneficiary is still incapacitated, physically or mentally, for service in the office or department of the State where he was employed and in the position held by him when retired for disability. If the Board of Administration determines that said beneficiary is not so incapacitated, his retirement allowance shall be canceled forthwith, and he shall be reinstated to the position held by him when retired for disability.

SEC. 91. Should a disability beneficiary reenter the State service and be eligible for membership in the retirement system in accordance with section 26 of this act, his retirement allowance shall be canceled and he shall immediately become a member of the retirement system, his rate of contribution for future years being that established for his age at the time of such reentry. His individual account shall be credited with an amount which is the actuarial equivalent of his annuity at that time, as based on a disabled life, but such amount shall not exceed the amount of his accumulated contributions as such amount stood at the time of his retirement for disability. Such member shall receive credit for prior service in the same manner as though he had never been retired for disability.

[Amended, Statutes 1933, Chapter 473.]

SEC. 92. Should a disability beneficiary, prior to attaining age sixty, engage in a gainful occupation not in the State service or should he reenter the State service in a capacity ineligible for membership in the retirement system, the Board of Administration shall reduce the amount of his retirement allowance to an amount which, when added

to the compensation earned by him in such occupation, shall not exceed the amount of the final compensation on the basis of which his retirement allowance was determined. Should the earning capacity of such beneficiary be further altered, the board may further alter his retirement allowance to an amount which shall not exceed the amount upon which he was originally retired, but which, subject to such limitation, shall equal, when added to the compensation earned by him, the amount of his final compensation on the basis of which his retirement allowance was determined. When such a disability beneficiary reaches age sixty, his retirement allowance shall be made equal to the amount upon which he was originally retired, and shall not again be modified for any cause.

SEC. 93. Should any disability beneficiary under age sixty refuse to submit to medical examination his pension may be discontinued until his withdrawal of such refusal, and should such refusal continue for one year his retirement allowance may be canceled.

SEC. 94. Should the retirement allowance of any disability beneficiary be canceled for any cause other than reentrance of the State service he shall be paid his accumulated contributions, less the annuity payments made to him.

Optional Modification of Retirement Allowance

SEC. 95. Until the first payment on account of any retirement allowance is made, and subject to the condition that, if he die after retirement and within thirty days from the date upon which his election is received at the office of the retirement system in Sacramento, then said election is void and of no effect, and the death shall be considered as that of a member before retirement, a member or a beneficiary may elect to receive the actuarial equivalent of his retirement allowance as of the date of retirement, in a lesser retirement allowance, payable throughout life with one of the following options.

[Amended. Statutes 1937, Chapter 806.]

SEC. 96. Option 1. If he dies before he receives in annuity payments provided for in section 81 and section 87 of this act, the amount of his accumulated contributions as it stood at his retirement, the balance of such accumulated contributions shall be paid to his estate or to such person, having an insurable interest in his life, as he shall nominate by written designation duly executed and filed with the Board of Administration;

SEC. 97. Option 2. Upon his death, his lesser retirement allowance shall be continued throughout the life of and paid to such person, having an insurable interest in his life, as he nominates by written designation duly executed and filed with the Board of Administration at the time of his retirement;

SEC. 98. Option 3. Upon his death, one-half of his lesser retirement allowance shall be continued throughout the life of and paid to such person, having an insurable interest in his life, as he nominates by written designation duly executed and filed with the Board of Administration at the time of his retirement;

SEC. 99. Option 4. Such other benefit or benefits shall be paid, either to the beneficiary or to such other person or persons as he nomi-

nates, as, together with such lesser retirement allowance, are the actuarial equivalent of his retirement allowance, and shall be approved by the Board of Administration.

Death Benefit

SEC. 100. Upon the death before retirement of a member while in the State service, or within four months after the discontinuance of State service, or while physically or mentally incapacitated for the performance of his duty, if such incapacity has been continuous from discontinuance of State service, the retirement system shall be liable for a death benefit, which if an amount is due under clause (3) next following, and if there is a surviving wife or surviving children, shall be paid in monthly installments and to the surviving wife and children as prescribed therein, otherwise such death benefit shall be paid to his estate, or to such person having an insurable interest in his life as he has nominated by written designation duly executed and filed with the retirement board. Such death benefit shall consist of:

(1) His accumulated contributions, and in addition thereto,

(2) An amount, provided from contributions by the State, which shall be equal to one-twelfth of the annual compensation earnable by the deceased during the twelve months immediately preceding his death, multiplied by the number of completed years of service under the system, but not to exceed fifty per centum of such compensation.

If such member is a member of the California Highway Patrol and if, as determined by the Industrial Accident Commission in the same manner as for all other State employees, death shall be the result of injury or disease arising out of and in the course of employment, then in addition to the amounts set forth in clauses (1) and (2), there shall be paid

(3) An amount sufficient, when added to the amounts provided in the next preceding paragraphs (1) and (2), to provide, when applied according to tables adopted by the board, a monthly death benefit allowance, equal to one-half of the compensation earnable by such member during the five years immediately preceding his death, to be paid to the surviving wife to whom said member was married prior to sustaining the said injury, to continue as long as she shall live or until her marriage; or if there is no widow, or if the widow dies before all children of such deceased member attain the age of eighteen years, then to his child or children under said age collectively, to continue until every child dies or attains said age. If payment of the allowance is stopped because of remarriage of the widow or attainment of the age of eighteen years by a child, before the sum of the monthly payment made equals the sum of the amounts provided in the next preceding clauses (1) and (2), then an amount equal to the difference between said sums shall be paid in one amount to the remarried widow, or if there is no widow, to the surviving children of the deceased member, share and share alike.

[Amended, Statutes 1933, Chapter 473.]

[Amended, Statutes 1933, Chapter 850.]

SEC. 100a. A person, while a member or after retirement, shall have the right to revoke the nomination of a beneficiary made by him

under the retirement system, and to nominate a beneficiary in lieu thereof, all by written designation duly executed and filed with the retirement board, provided that this right shall not extend to beneficiaries nominated under options 2, 3, and 4 in sections 97, 98 and 99 of this act, nor shall it extend to dependents designated as beneficiaries by this act to receive benefits payable on account of death or disability arising out of and in the course of employment.

[Added, Statutes 1935, Chapter 850.]

SEC. 100b. The board of administration, in the event that the whereabouts of the nominated beneficiary can not be determined, or in the event that the nominated beneficiary be the estate of the deceased person, may pay to the undertaker who conducted the funeral in its discretion all or a portion of the amount payable under this section 100, but not to exceed the funeral expenses of such deceased person as evidenced by the sworn itemized statement of the undertaker and by such other documents as the board may require. Said payment shall be full and complete discharge and acquittance of the amount payable under this section up to the amount so paid, anything in this act to the contrary notwithstanding.

[Added, Statutes 1935, Chapter 850.]

Retirement Benefits Not Modified by Compensation Insurance Except for Highway Patrol

SEC. 101. No modification of the benefits provided herein shall be made on account of any amounts payable to a beneficiary, as defined herein, under the Workmen's Compensation, Insurance and Safety Act of the State of California, except that the portion of any retirement allowance or death allowance which is provided by contributions of the State and which is payable by the retirement system because of the death or retirement of any member of the California Highway Patrol, as a result of injury or illness arising out of and in the course of employment, shall be reduced in the manner hereinafter described, by the amount of any benefits, other than medical benefits, payable to or on account of such member under the Workmen's Compensation, Insurance and Safety Act of the State of California, because of his death or the disability resulting in his retirement.

If said benefits under said Compensation Act shall run concurrently with said allowance hereunder and shall be due the beneficiary in payments which are equal to or less than said portion of the retirement allowance or death allowance, then said portion shall be reduced each month by the amount of said benefits so due during said month, and the beneficiary shall have no more right to such reduction than if the retirement system had never existed.

If said benefits under said Compensation Act shall run concurrently with the allowance hereunder and shall be due to the beneficiary in payments which are greater than said portion of the retirement allowance or death allowance, then payment of said portion shall be withheld until the total of the amounts so withheld shall equal the total of said benefits paid, and the beneficiary shall have no more right to such amounts withheld than if the retirement system had never existed.

It is the purpose of the preceding paragraphs of this section to reduce the portion of the retirement or death allowance payable from

the retirement fund and which is provided by contributions of the State, by the amount of benefits, other than medical benefits, due to the beneficiary concurrently with said portion, under said Compensation Act, and the payment before due date by the commutation through compromise or otherwise of such benefits shall not prevent the reduction of said portion, as provided in this section, in the amounts which would have been payable concurrently with the retirement allowance in the absence of such commutation.

If any benefits, other than medical benefits, shall have been paid under said Compensation Act because of a permanent disability concurrently with payments of wages or salary, to said beneficiary, then payment of said portion of the retirement allowance or death allowance shall be withheld until the total of the amounts so withheld shall equal the total of such benefits paid because of the permanent disability, and the beneficiary shall have no more right to such amounts withheld than if the retirement system had never existed. Said benefits which are payable for time during which salary is not paid and prior to the effective date of the retirement or death allowance, shall not be considered hereunder.

If an injury, known to result in the retirement of and/or the death of a member of California Highway Patrol, is the proximate consequence of the act of a person other than his employer, the retirement system shall have the right to recover from said person an amount which shall be the actuarial equivalent of the benefits for which it shall be liable because of said injury and/or death, and said right shall be determined under the provisions of section 26 of the Workmen's Compensation, Insurance and Safety Act. Said retirement system may join with the employer and/or its compensation insurance carrier in any proceeding under said section, and any amount recovered by any of the parties shall be applied first on the amounts which the employer or its insurance carrier shall have paid or become obligated to pay, and second, on the amounts which the retirement system shall have paid or become obligated to pay.

Amounts by which retirement and death allowances are reduced and amounts recovered from third persons under the provisions of this section shall be paid by the retirement system to the motor vehicle fund.

[Amended, Statutes 1935, Chapter 850.]

[Amended, Statutes 1937, Chapter 806.]

Monthly Payment of Allowance

SEC. 102. A pension, an annuity or retirement allowance granted under the provisions of this act shall be payable in equal monthly installments but a smaller pro rata amount may be paid for part of a month when the pension, annuity or retirement allowance begins after the first day of the month or ends before the last day of the month.

Retirement Fund Exempt from Execution, Garnishment, Attachment, or Assignment

SEC. 103. The right of a person to a pension, an annuity or a retirement allowance, to the return of contributions, the pension,

annuity or retirement allowance itself, any optional benefit, any other right accrued or accruing to any person under the provisions of this act and the moneys in the fund created under this act shall not be subject to execution, garnishment, attachment, or any other process whatsoever, and shall be unassignable except as in this act specifically provided.

Estimate of Age and Service

SEC. 104. If it shall be impracticable for the Board of Administration to determine from the records the length of service, the compensation or the age of any member, or if any member refuses or fails to give the board a statement of his State service, his compensation or his age, the said board may estimate, for the purposes of this act, such length of service, compensation or age.

[Amended, Statutes 1933, Chapter 473.]

State Can Not Pay for Service After Retirement

SEC. 105. No person who has been retired for service of disability and who receives a retirement allowance under the retirement system shall be paid for any service rendered by him to the State after the date of his retirement.

SEC. 106. If any section, subsection, sentence, clause or phrase of this act, is, for any reason, held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The Legislature hereby declares that it would have passed this act, and each section, subsection, sentence, clause, and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared unconstitutional.

SEC. 107. All acts and parts of acts in so far as they conflict with this act are hereby repealed.

Appropriation

SEC. 108. From and after the date the system created by this act takes effect, out of any moneys in the State treasury not otherwise appropriated, there shall be paid monthly into the "State employees' retirement fund" a sum equal to three and seventy-five one-hundredths per centum of the total compensation paid members of the retirement system whose compensation is paid from the general fund of the State. The Board of Administration shall certify to the State Controller at the end of each month the total amount of compensation paid such members of the retirement system, and the State Controller shall thereupon transfer three and seventy-five one-hundredths per centum of this amount from the general fund of the State to the "State employees' retirement fund." For the purposes of this section and section 109, compensation paid from the vocational education fund or the vocational rehabilitation fund or any other fund received, in whole or in part as a donation to the State, with restrictions as to its use which prevent contributions under section 109 hereof, to members of the retirement system as employees of the Department of Education, and compensation paid from the funds of the university to members of the retirement system as employees of the university, shall be considered as paid from the general fund of the State. Contribu-

tions made to the retirement system under this section and the section next following shall be applied by the Board of Administration to meet the State's obligations under the system in the order and amounts as follows: first, in an amount equal during each fiscal year to the liability accruing because of State service rendered during such year and on account of pensions provided for in section 82 and sections 86 to 89, inclusive, such amount to be determined by the actuarial valuation provided for in section 51, as interpreted by the actuary of said board; second, in an amount equal during each fiscal year to the payments made, from contributions by the State, during such year as provided in section 100; third, in an amount equal to the balance of such contributions, on the liabilities accrued on account of prior service benefits granted under sections 83 to 84, inclusive, and sections 86 to 89, inclusive.

[Amended, Statutes 1933, Chapter 473.]

[Amended, Statutes 1935, Chapter 152.]

[Amended, Statutes 1937, Chapter 806.]

SEC. 109. In addition to such payments from the general fund, there shall be paid monthly, from and after the date this act takes effect, into the State employees' retirement fund out of the motor vehicle fund a sum equal to nine and twenty one-hundredths per centum of the total compensation paid from said fund to members of the retirement system who also are members of the California Highway Patrol and out of said motor vehicle fund and every other fund directly controlled by the State, out of which the compensation of members is paid, a sum equal to three and seventy-five hundredths per centum of the total compensation paid members, other than members of the said highway patrol, of the retirement system from the said fund. All such payments, whether heretofore or hereafter made are hereby validated and confirmed. The board of administration shall certify to the State Controller at the end of each month the total amount of compensation paid such members of the retirement system from each such fund and the State Controller shall thereupon transfer the percentages as specified in this section, of said total amount from each such fund, respectively, to the "State employees' retirement fund." If any member of the said highway patrol shall affirmatively exercise the option in section 65d, the Controller shall transfer into the said retirement fund from the motor vehicle fund upon certification by the board of administration of the total compensation received by said member for service as a member of the retirement system rendered prior to July 1, 1935, three and ninety one-hundredths per centum of said total compensation. The appropriation made by Chapter 865, Statutes of 1933, shall no longer be held solely for the benefit of the persons designated therein, but shall be applied on the State's liability for benefits based on prior service of all members of the California Highway Patrol. In the event a special fund is created by law from which moneys for the support of the Department of Motor Vehicles are to be paid, all contributions to the State employees' retirement fund for employees of the Department of Motor Vehicles shall be paid from such special fund.

[Amended, Statutes 1933, Chapter 473.]

[Amended, Statutes 1935, Chapter 850.]

[Amended, Statutes 1937, Chapter 858.]

SEC. 109a. All payments of the State into the "State employees' retirement fund," whether made as provided in sections 108 and 109 of this act, or heretofore made as otherwise provided, are hereby made and shall continue to be obligations of the State.

[Added, Statutes 1933, Chapter 473.]

\$416.66 Maximum Salary Considered

SEC. 110. For the purpose of computing the total amounts of compensation of members under the provisions of sections 108 and 109 of this act, the compensation of every member who receives in excess of \$416.66 per month shall be computed as \$416.66 per month.

SEC. 111. With the approval of the Department of Finance, any fund out of which payments are made under the provisions of section 109 of this act may be reimbursed to the extent of such payments by transfer of a sufficient sum for such reimbursement from another fund or funds under the control of the same disbursing officer. The disbursing officer shall certify to the State Controller the amount or amounts to be thus transferred, the fund or funds from which and to which the transfer is to be made, and if such certificate is approved by the Department of Finance the Controller shall thereupon make the transfer as directed in the certificate.

SEC. 112. Out of any moneys in the State treasury not otherwise appropriated, the sum of thirty-five thousand dollars is hereby appropriated for the support of the Board of Administration. The board may withdraw without at the time furnishing vouchers and itemized statements, a sum not to exceed five hundred dollars to be used as a revolving fund. At the close of the biennium or at any other time upon the demand of the Department of Finance, such sum must be returned to the State treasury.

SEC. 113. This act may be cited as the State Employees' Retirement Law.

[Added, Statutes 1937, Chapter 806.]

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CHARLES ELMORE CROPLEY
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. [REDACTED] 13 Original

STATE OF CALIFORNIA,

Complainant,

vs.

MURRAY W. LATIMER, JAMES A. DAILEY
and LEE M. EDDY, individually and as mem-
bers of the Railroad Retirement Board, and
GUY T. HELVERING, individually and as
Commissioner of Internal Revenue,

Defendants.

MOTION FOR LEAVE TO FILE AND BRIEF OF
COMPLAINANT STATE OF CALIFORNIA IN
SUPPORT OF MOTION FOR LEAVE TO FILE BILL
OF COMPLAINT

THE STATE OF CALIFORNIA,

By U. S. WEBB,

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MURRAY W. LATIMER, JAMES A. DAILEY
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bers of the Railroad Retirement Board, and
GUY T. HELVERING, individually and as
Commissioner of Internal Revenue,
Defendants.

MOTION FOR LEAVE TO FILE AND BRIEF OF COMPLAINANT STATE OF CALIFORNIA IN SUPPORT OF MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

On April 4, 1938, complainant above named filed herein its motion for leave to file bill of complaint, together with notice of hearing of such motion. With the motion and notice there was presented to the court the bill of complaint which is the subject of the motion.

On April 11, 1938, the court issued its rule for the defendants to show cause, returnable on or be-

fore, April 25, 1938, why permission to file the bill should not be granted.

The defendants on April 25, 1938, filed their response to the rule to show cause, in which response they asked leave to file their accompanying brief, and this brief was filed.

As complainant has heretofore filed a very short brief, expressed in general terms, with its motion for leave to file bill of complaint, the accompanying brief in support of said motion and in reply to the brief of defendants is herewith presented to the court and complainant asks leave to file the same.

QUESTIONS PRESENTED

On pages 3 and 4 of their brief defendants state the questions which, according to their view, are presented on the motion of complainant. These questions are stated as follows:

“1. Whether the Collector of Internal Revenue for the First District of California and the employees of the State Belt Railroad are indispensable parties in whose absence the court should not proceed.

2. Whether to join the Collector of Internal Revenue for the First District of California, a California citizen, would deprive this court of original jurisdiction.

3. Whether to join the employees of the State Belt Railroad, some of whom are citizens of California, would deprive this court of original jurisdiction.

4. Whether the bill of complaint alleges facts to show that the complainant will suffer irreparable injury from any action taken or threatened by the defendants.

5. Whether complainant has an adequate legal remedy through the payment of the taxes accrued under the Carriers Taxing Act of 1937, followed by a suit for refund.

6. Whether this suit is prohibited by section 3224 of the Revised Statutes.

7. Whether the United States is an indispensable party which can not be joined because it has not consented to be sued.

8. Whether this court should deny leave to file the bill of complaint for the reason that all of the issues which it presents have been decided adversely to the complainant by previous decisions of this court."

The argument of defendants contained on pages 14 to 50 of their brief follows, in general, the same order as the questions above stated. We shall answer such arguments in the order in which they have been presented by defendants.

STATEMENT OF FACTS

On pages 4 to 9 of their brief defendants have given a statement in the form of a resume of the facts as alleged in the bill of complaint. This statement, in the main, sufficiently calls the attention of the court to the pertinent facts of the case. There is, however, one important omission to which we now direct the court's attention.

In Paragraph IV, page 13 of the complaint, there is the following allegation:

“Said State Belt Railroad is an essential and indispensable facility of the San Francisco Harbor, administered by the State of California by and through the Board of State Harbor Commissioners of San Francisco Harbor, and said state in the construction, maintenance, operation, management and control of said State Belt Railroad is engaged in a usual, traditional and essential governmental function.”

This allegation is the kernel of complainant's main contention that the Railroad Retirement Acts of 1935 and 1937 and the Carriers' Taxing Act of 1937 do not apply to the State of California, and an understanding of this contention is of vital importance in considering all of the jurisdictional questions which have been raised by defendants in their brief. We shall accordingly discuss this matter before answering the objections of defendants.

**I. THE STATE OF CALIFORNIA, COMPLAINANT
HEREIN, IN THE CONSTRUCTION, MAINTENANCE,
OPERATION, MANAGEMENT AND CONTROL OF
THE STATE BELT RAILROAD, IS ENGAGED IN THE
PERFORMANCE OF A USUAL, TRADITIONAL AND
ESSENTIAL GOVERNMENTAL FUNCTION, AND AS
SUCH IS IMMUNE FROM THE EXCISE TAX
SOUGHT TO BE LEVIED PURSUANT TO THE CAR-
RIERS' TAXING ACT OF 1937**

**A. This Court, in Rogers vs. Graves, 299 U. S. 401,
and Brush vs. Commissioner, 300 U. S. 352, has
Adopted Three Major Tests in Determining Whether
Any Particular Function of a Government Is Govern-
mental or Proprietary. These Tests Are as Follows:**

**“(a) What were the public necessities which
required state or federal action?**

**(b) Is the agency selected truly an instru-
mentality of government?**

**(c) To what extent have governments exer-
cised the function?**

**We shall consider these questions in order, so far
as they relate to the operation of the State Belt
Railroad by complainant.**

**(a) Public necessity for the creation of the
Board of State Harbor Commissioners for San
Francisco Harbor, and the construction, main-
tenance and operation by said Board of the State
Belt Railroad.**

The State of California, through the Board of State Harbor Commissioners for San Francisco Harbor, exercises jurisdiction and control over a strip of water front land in the City and County of San Francisco bordering on tidewater in San Francisco Bay and of a certain part of the bay itself. Both the lands bordering the water and the adjacent lands submerged by the waters of the bay are integral parts of the harbor and their management and control by a single agency are necessary for the efficient and safe transportation of persons and property in and out of the City and County of San Francisco and the territory of the state tributary to said city and harbor.

These lands along the water front, from the time of the admission of the state into the union, have been sovereign lands of the state. The efficient operation of the harbor requires control over all of these lands under one agency in order that all of the facilities of the harbor may be integrated and the different activities thereof harmonized. Without such integration and unity of control the water front lands and harbor facilities could not be utilized so as to furnish the best possible service to the public at a fair price. Such unified control is also necessary in order that adequate facilities to accommodate the commerce of the port may be supplied when and as needed. The history of the port has shown the necessity for state ownership

and control and for the furnishing of credit by the state in order properly to develop the harbor.

Public control of the harbor is also required in order that the water front shall be properly policed and that regulations concerning the movement of vessels to and from piers and slips and along the water front shall be properly regulated. Such public control is also required in order that safe and proper landings may be constructed and that rules shall be made and enforced regarding the landing of goods and the conditions under which they may remain upon wharves.

In this connection it may be further stated that the efficient operation of the harbor has required the construction and maintenance of a street paralleling the bay along the entire water front and located on lands belonging to the state. Only a public agency would have the necessary power, including the power of eminent domain, to open and maintain such a street and regulate the traffic thereon.

The State Belt Railroad was constructed and is maintained and operated pursuant to the provisions of the Harbors and Navigation Code of said state (Statutes 1937, Chapter 368), annexed as Exhibit "C" to the bill of complaint herein. This railroad is an absolute necessity in the operation of the harbor. It consists essentially of a belt line running on the Embarcadero, state-owned property, parallel to the water front of San Francisco, and of spur tracks leading from said belt line on to each

of the forty-five or more piers under the control of the Board of State Harbor Commissioners and also connecting with the yards and tracks of interstate carriers by railroad, delivering to and receiving from said State Belt Railroad their cars containing merchandise coming into San Francisco and going out from San Francisco over their lines. The harbor could not operate without the State Belt Railroad, and a railroad of this kind is an integral and necessary part and facility of the Port of San Francisco.

(b) The Board of State Harbor Commissioners, in constructing, maintaining and operating the State Belt Railroad, is an instrumentality of the State of California engaged in the performance of a usual and traditional governmental function.

That the Board of State Harbor Commissioners is an instrumentality of the State of California is evident from the fact that the state has not seen fit to create any intervening political subdivision, authority or corporate body through which to effect its purposes with respect to San Francisco Harbor. The Board of State Harbor Commissioners is the State of California itself, operating through the state's directly appointed officers. Indicia of the status of the board as a state instrumentality are the following:

The board is required to render a biennial report to the Governor of the state; it has the power of appointment of officers and employees of the state; it has possession and control over the area of the

Port of San Francisco, owned by the state; officers and employees of the board are members of the State Civil Service System and of the Employees' Retirement System of the State of California; the revenues of the board must be deposited monthly in the state treasury and are subject to budgetary laws, and must be used pursuant to legislative appropriation; contracts of the board must be made in a manner prescribed by law; failure to comply with the rules of the board is a misdemeanor; bonded indebtedness for the work of the board is incurred through general obligation bonds of the State of California (Harbors and Navigation Code, Chapter 368, California Statutes 1937).

That the board is a state instrumentality engaged in performing governmental functions has been recognized in *United States vs. State of California*, 297 U. S. 175, 184; *Sherman vs. United States*, 282 U. S. 25, 29. In *Taylor vs. Spear*, 196 Cal. 709, 715 (238 Pac. 1038), the court referred to the board as "one of the state agencies of the State of California." See also *Denning vs. State*, 123 Cal. 316, 321 (55 Pac. 1000), on this point.

It was specifically held in *Platt vs. Commissioner*, 35 B. T. A. 472 (1937) that the Board of State Harbor Commissioners of California is engaged in the performance of a usual governmental function and that the salaries of the members of the board and its employees are immune from federal taxation.

A partial enumeration of the powers of a governmental nature exercised by the board are as follows: It has powers relating to landing and loading of merchandise; constructing wharves and improvements; making repairs; assigning berths and slips to vessels; building a sea wall and dredging; providing harbor police and making quarantine regulations; extending streets and establishing thoroughfares; exercising the power of eminent domain; providing a location for a public market; locating and constructing public dry docks; locating docks for federal use; operating a state belt railroad; providing a location for air ports; contracting for and using fire boats; removing obstructions to commerce and navigation; mapping water front changes; making rules and regulations for the commerce of the port.

In exercising its governmental activities the board has installed in excess of fifty navigation signals, including lights, sirens, and bells, while the federal government has installed only one, within the pier head line. The board has not only maintained a thoroughfare along the whole water front called the Embarcadero but has constructed a subway along and under the same for the improvement of traffic in front of the ferry depot, and has under statutory provision purchased property for the straightening of the lines of said street.

That the board is not acting in a proprietary capacity is shown by the statutory requirement (Section 3084, Harbors and Navigation Code) that

a greater amount of money shall not, in the main, be collected pursuant to the terms of said code than is necessary to enable the Board of State Harbor Commissioners to perform the duties required, exercise its authorized powers, and provide for interest and redemption requirements for bonds issued for any of the harbor purposes. This statutory policy has been followed continuously by the board.

This statutory restriction upon revenues is clearly designed in the interest of the public for the establishment of port charges as low as the operation of the harbor will permit and, in fact, has resulted in the establishment at said Harbor of San Francisco of exceedingly low port charges.

The State Belt Railroad is not a separate entity from the Board of State Harbor Commissioners. It has no separate corporate existence. It is merely one of the facilities constructed and operated by the board in the exercise of its governmental function of controlling, operating and managing San Francisco Harbor. The railroad is an absolute necessity in the operation of the harbor. Merchandise brought to the harbor by interstate carriers by railroad on the one hand, and vessels engaged in the coast-wide and foreign trade on the other hand, can not be transferred through the harbor without the use of such railroad. The railroad is therefore just as much a facility of the board as are the piers constructed and managed by the

board, and is just as much a facility as any mechanical device used in the handling of cargo coming into or going out of the port. The use of this railroad is so vital that it may be said with truth that without it the harbor could not function.

In Part VI, pages 46-50 of defendants' brief, an attempt is made to show that the state acting through the Board of State Harbor Commissioners is not exercising a usual and traditional governmental function in operating San Francisco Harbor and the State Belt Railroad.

In this connection it is stated that this court has held in *United States vs. California*, 297 U. S. 175, 186, citing *California Canneries Co. vs. Southern Pacific*, 51 I. C. C. 500, that the State of California, in operating the State Belt Railroad, is a carrier subject to Part I of the Interstate Commerce Act. This court has so held. It is submitted, however, that the cited case involved the application of a penalty upon the state for violation of the Federal Safety Appliance Act, a statute manifestly and solely having for its purpose the regulation of interstate commerce. No question of taxation was involved in the case. Indeed, at pages 184 and 185 this court drew a sharp distinction between the federal power to regulate commerce and the power to tax, asserting the plenary power of the United States as to the former, while admitting the immunity of state instrumentalities from the latter.

Board of Trustees vs. United States, 289 U. S. 48, is also cited as authority for the proposition that the proper criterion of the immunity of the State of California from the Carriers' Taxing Act of 1937 is its immunity as against the regulatory powers of congress rather than its immunity to ordinary taxation.

The obvious answer to this contention is twofold: (1) Congress enacted the Carriers' Taxing Act of 1937 pursuant to its taxing power, if pursuant to any power, under Article I, section 8, clause I of the federal constitution; (2) the Railroad Retirement Acts of 1935 and 1937 were not enacted pursuant to the power of Congress to regulate interstate commerce.

This court in *Retirement Board vs. Alton Railroad Co.*, 295 U. S. 330, 362, 374, definitely was of the opinion that the Railroad Retirement Act of 1934 (48 Stat. 1283) was not in purpose or effect a regulation of interstate commerce within the meaning of the constitution. We submit that the Railroad Retirement Acts of 1935 and 1937, by the same process of reasoning, are not regulations of interstate commerce within the meaning of the constitution.

We submit that the taxing features of the Carriers' Taxing Act of 1937, whether considered as one act along with the Retirement Acts or separately, can be justified, if at all, only as an exercise of the taxing power.

See

Alton Railroad Co. vs. Railroad Retirement Board, 16 Fed. Supp. 955, 956.

We note that the duties involved in the Board of Trustees case were, in this court's opinion, imposed in the exercise of the power to regulate foreign commerce (page 58). Further, that this court said:

"The fact that the State in the performance of State functions may use imported articles does not mean that the importation is a function of the State government independent of federal powers. There is thus no violation of the principle which petitioner invokes, for there is no encroachment on the power of the State as none exists with respect to the subject over which the Federal power has been exerted." (Page 59.)

See

United States vs. California, 297 U. S. 175, 184.

Neither is *Helvering vs. Powers*, 293 U. S. 214, in point. The railroad in that case was a road which had been in private ownership. It was being operated by the state through trustees for the purpose of rehabilitating a private corporation. The operation of the railroad was rightly held not to be an exercise of a usual governmental function.

We can not see how *Willcuts vs. Bunn*, 282 U. S. 216, 225, is even remotely in point. There the tax was imposed, not upon a state, but upon a private individual who had invested in government bonds, and the tax was levied by reason of profits realized

from the sale of the bonds. This court considered that such a tax was not a direct burden upon a governmental instrumentality, and indeed, it is difficult to see how it could have been in any degree such a burden.

In the instant case the tax, if legal, must be paid directly by the state, out of moneys received from the operation of a state instrumentality. Such tax could not be paid in any other way (Harbors and Navigation Code, Section 1706).

Neither *Ohio vs. Helvering*, 292 U. S. 360, nor *South Carolina vs. United States*, 199 U. S. 437, is authority on the power of the federal government to collect taxes of the kind involved in this case. In both of those cases the taxes were imposed upon activities of the states which were traditionally and historically proprietary in character. There is a clear cut distinction between the activity of a state in engaging in the liquor business and the functioning of a state in the operation of a harbor facility.

(c) Governments have universally exercised the function of developing and operating their ports and harbors.

In *Commissioner vs. Ten Eyck*, 76 Fed. (2d) 515, the court reviewed the history of the construction and operation of ports and harbors in this country and in other countries and concluded that:

“Port and harbor developments have long been regarded as governmental functions in providing for the welfare and prosperity of the people.

* * * Historically, port activities have been

shown to be almost universally directly subject to the supervision of agencies of the government."

With respect to the operation of a railroad by the Albany Port District Commission, the court said in the same case:

"It did operate the railroad, and charged rates authorized by the Interstate Commerce Commission. But we think that this terminal was intended as an instrument of government rather than of commerce only. In providing it and operating it, the state of New York was engaged in a usual governmental function as distinguished from a proprietary function."

In *Denning vs. State*, 123 Cal. 316, the Supreme Court of California said at pages 321 and 322:

"The provisions of the constitution clearly show that the State has retained control of the harbor and frontages thereon for the use and benefit of the people, for the promotion of commerce and the general benefit of the body politic, and not as a mere business enterprise through which profits may accrue to the state treasury; and the statute creating the state board of harbor commissioners is intended and adapted to the execution of this purpose. It gives, it is true, various powers to that board, and imposes upon it various duties, some of them of a character which, under certain circumstances, may give a cause of action against the state. * * * But the powers and duties of the board are diversified. It has control of the bay and of the vessels

using it; keeping open passageways for the ferry boats; controlling the anchorage of vessels; removing vessels from the wharves and piers when unloaded, and the general care of all the property belonging to the State and connected with the wharves and piers, or used by said board. These duties are of a police character and purely governmental.

“The fact that the board is authorized or required to collect tolls and charges for dockage and wharfage to such extent ‘as will enable the commissioners to discharge the duties required of them by the act’ does not affect its character as a governmental agency.”

This court in *Sherman vs. United States*, 282 U. S. 25, considered the capacity in which the State of California acts in operating the State Belt Railroad and expressed itself as follows:

“The matters complained of occurred upon what is known as the State Belt Railroad. The road is about five miles long, within the City of San Francisco, runs nearly parallel with the waterfront of the harbor, and connects many industrial plants and the line of the Southern Pacific Railroad Company with wharves belonging to the State and through the wharves with other common carriers engaged in interstate commerce by railroad. It may be assumed that the work done upon the Belt Line was interstate commerce. *But the line belongs to and is operated by the State; the work is done without profit for the purpose of facilitating the commerce of the port, and the funds received after*

paying expenses go to the Treasury of the State to the credit of the San Francisco Harbor Improvement Fund. California has not gone into business generally as a common carrier but simply has constructed the Belt Line as an incident of its control of the harbor—a State prerogative.” (Italics ours.)

Authorities might be multiplied to show that the construction, maintenance, and operation of harbors, including the usual facilities appurtenant thereto, have universally been considered governmental functions.

B. The State of California Owning and Operating the State Belt Railroad Is the Carrier

It is sufficient in this regard to state that it was decided in *Sherman vs. United States*, 282 U. S. 25, and in *United States vs. California*, 297 U. S. 175, that in the operation of the State Belt Railroad the state itself is the carrier.

C. The State of California, in the Operation of the State Belt Railroad, Is Immune From the Excise Tax Sought to Be Levied Upon the State Pursuant to the Carrier's Taxing Act of 1937

We have hereinabove shown that in the construction, maintenance and operation of the State Belt Railroad the State of California is engaged

in the performance of a usual, traditional and essential governmental function.

The doctrine that the activity of a state while so functioning can not be taxed is so firmly established that we shall not burden the court with a citation of other than the leading cases upon this point. The earliest and the leading cases upon this subject are *McCulloch vs. Maryland*, 4 Wheat. 316 (1819), and *Collector vs. Day*, 11 Wall. 113. The doctrine of these cases has been followed in numberless decisions of the Supreme Court of the United States, and the various federal and state courts.

It is also settled that the doctrine of immunity is necessarily reciprocal as between the federal government and the various state governments.

Collector vs. Day, supra.

We assume that there is no controversy in this case as to these fundamental doctrines, and we shall not further discuss them.

In conclusion on this point, we submit that complainant's case is entirely meritorious and is supported by all the decisions rendered by this court relative to the reciprocal immunity of federal and state governments from taxation by each other.

The recent cases which have somewhat narrowed the doctrine by refusing to grant the immunity to independent contractors dealing with

their respective governments are not controlling in the instant matter. See

James vs. Dravo Contracting Co., 58 S. Ct. 208
(Dec. 6, 1937);

Silas Mason vs. Tax. Comm., 58 S. Ct. 233
(Dec. 6, 1937);

Helvering vs. Mountain Producers Corp., ----
U. S. ---- (March 7, 1938).

II. NEITHER THE COLLECTOR OF INTERNAL REVENUE NOR THE EMPLOYEES OF THE STATE BELT RAILROAD ARE INDISPENSABLE PARTIES TO THIS PROCEEDING

This court has original jurisdiction of all cases in law and equity which involve controversies between a state and citizens of another state. (See Appendix to defendants' brief, quoting Article III, section 2, clauses 1 and 2 of the *Constitution of the United States.*)

In their brief defendants take the position that the Collector of Internal Revenue for the First District of California is an indispensable party to this proceeding and that the employees of the State of California operating the State Belt Railroad are likewise indispensable parties. The defendants further contend that, assuming that the employees and the collector are citizens of the State of California, they can not be joined as parties without ousting the jurisdiction of this court. We concede that the employees and the collector are citizens of the state and that the joinder of either the employees or the

collector would oust this court of jurisdiction. We maintain, however, that neither the collector nor the employees are indispensable parties to this suit.

In *California vs. Southern Pacific Co.*, 157 U. S. 229, this court noted that there are the following classes of parties to a bill in equity:

“1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.”

A. The Collector of Internal Revenue Is Not an Indispensable Party to This Proceeding

Section 319, R. S. (26 U. S. C. A. Sec. 1700) provides for the appointment of the Commissioner of Internal Revenue by the President by and with the advice and consent of the senate.

26 U. S. C. A. section 1701, provides:

“(a) The Commissioner under the direction of the Secretary,

(1) Shall have general superintendence of the assessment and collection of all duties and taxes imposed by any law providing internal revenue; and

(2) Shall prepare and distribute all the *instructions, regulations, directions*, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue
* * *.” (Italics ours.)

With respect to these provisions, the Attorney General of the United States in 22 Op. Atty. General, 570, said:

“By this law the Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, has the general *management, supervision and control* of the assessment and collection of internal revenue taxes. He has authority to give *instructions* and to make *regulations* such as may be necessary to carry out the general purpose of the law.” (Italics ours.)

A regulation has the force of law.

United States vs. Eliason, 16 Pet. 291;

Ex parte Reed, 100 U. S. 13;

Gratiot vs. United States, 4 How. 80;

Harvey vs. United States, 3 Ct. of Claims 38.

Section 7 (a) of the Carriers' Taxing Act of 1937 provides:

“(a) The taxes imposed by this Act shall be collected by the Bureau of Internal Revenue and

shall be paid into the Treasury of the United States as internal revenue collections.”

Section 7 (b) of said act provides:

“(b) The taxes imposed by this Act shall be collected and paid quarterly or at such other times and in such manner and under such conditions as may be prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury * * *.”

Section 12 of said act provides:

“The Commissioner of Internal Revenue * * * shall make and publish such rules and regulations as may be necessary for the enforcement of this Act.”

The Commissioner of Internal Revenue not only has control and supervision over the collectors of internal revenue, but as provided by R. S. Sec. 3163 (26 U. S. C. A. Sec. 1732):

“Collectors may be suspended by the Commissioner for fraud, or gross neglect of duty, or abuse of power.”

It is plain from these provisions of the general statutes, from the specific provisions of the Carriers' Taxing Act of 1937, and from the interpretation of the general law by the Attorney General of the United States that collectors of internal revenue, while under a duty to *collect* duties, act only under the supervision and direction of the Commissioner of Internal Revenue and in accordance with his regulations. If a collector does not follow such

directions and regulations, he may, in a proper case, be suspended by the commissioner for abuse of power.

We submit that defendants are in error in stating as they do on page 19 of their brief that the collector of internal revenue is "very differently situated from the subordinate officers sued in *Guerich vs. Rutter*, 265 U. S. 388, and *Webster vs. Fall*, 266 U. S. 507, where this court held that the suits could not proceed in the absence of the superior officers." The collector in the instant case bears a precisely similar relation to the commissioner as did the inferior officers to their superior officers in the cited cases.

As stated by the court in *Guerich vs. Rutter*, *supra*, referring to the National Prohibition Act and rules and regulations thereunder:

"The act and the regulations make it plain that the prohibition commissioner and the prohibition director are mere agents and subordinates of the Commissioner of Internal Revenue. They act under his direction and perform such acts only as he commits to them by the regulations. They are responsible to him and must abide by his direction. What they do is as if done by him. He is the public's real representative in the matter, and, if the injunction were granted, his are the hands which would be tied. All this being so, he should have been made a party defendant—the principal one—and given opportunity to defend his direction and regulations."

The language used by the court with reference to the relation of the commissioner and his subordinates applies to the relations of the commissioner and the collector, with the single exception that the collector is not appointed by the commissioner. The relationship of superior and inferior is present, notwithstanding the method of appointment, and the power of control of the collector, as we have hereinabove shown, is vested in the commissioner.

We call the court's attention to the case of *Tait vs. Western Maryland Railway Co.*, 289 U. S. 620, in which this court held that a judgment by the Board of Tax Appeals, approved by the circuit court of appeals, giving the right to a corporation to deduct from gross income an amortized proportion of the discount on sales of bonds by its predecessors, worked an estoppel against the United States and the Collector of Internal Revenue in later litigation between the collector and the corporation as to its right to make similar deductions for subsequent years under the same statutory provisions and Treasury regulations. The ground of this decision was stated in the following words of the court:

"We think, however, that where a question has been adjudged as between a tax payer and the government or its official agent, the Commissioner, the Collector, being an *official inferior in authority, and acting under them, is in such privity with them that he is estopped by the judgment.*" (Italics ours.)

For the reasons assigned in the *Tait* case the Collector of Internal Revenue for the First District of California would be estopped from collecting any tax from the State of California after a decision of this court enjoining the Commissioner of Internal Revenue from taking any steps to collect such tax. The collector therefore is not an indispensable party to this proceeding.

B: The Employees of the State Belt Railroad Are Not Indispensable Parties in This Suit

In the determination of the class of party in a bill in equity, if any, to which a particular person belongs we must consider, first, the issues involved in the suit and, secondly, the effect upon such person of the determination of such issues.

It is the contention of complainant that the Railroad Retirement Acts of 1935 and 1937 and the Carriers' Taxing Act of 1937 are so interrelated and correlated that they in effect constitute one act having for its purpose the levying of an excise tax upon employers and an income tax upon employees to provide retirement benefits for railroad employees.

We call to the court's attention the case of *Alton Railroad Company vs. Railroad Retirement Board*, 16 Fed. Sup. 955, wherein the court in referring to the Railroad Retirement Act of 1935 (49 Stat. 967) and the Carriers' Taxing Act of 1935 (49 Stat. 974) said at page 956:

"The two taken together so dovetail into one another as to create a complete system * * *."

The provisions of the two acts in question are so interrelated and interdependent that each is a necessary part of the entire scheme * * *. It was clearly the intention of Congress that the pension system created by the *Retirement Act* should be supported by the taxes levied upon the carriers and upon employees.”

At page 957, the court expressed itself as follows:

“* * * As was said by the Supreme Court in *United States v. Butler*, 297 U. S. 1, 61, 56 S. Ct. 312, 317, 80 L. Ed. 477, 102 A. L. R. 914: ‘the exaction cannot be invested out of its setting, denominated an excise for raising revenue and legalized by ignoring its purpose as a mere instrumentality for bringing about a desired end. To do this would be to shut our eyes to what all others than we can see and understand.’ ”

At page 958 the court continued:

“I think that from what has been said, it necessarily follows that the two acts are inseparable parts of a whole, that Congress would not have enacted one without the other * * *.”

See also *United States vs. Butler*, 297 U. S. 1; *Railroad Retirement Board vs. Alton Railroad Company*, 295 U. S. 330.

In view of the similarity between the two acts discussed by the court in the *Alton Railroad* case, *supra*, and the acts in question herein, we submit that the discussion and the conclusions reached by the court relative to the nature and relationship of those acts are applicable and pertinent to the Railroad

Retirement Act of 1937 and the Carriers' Taxing Act of 1937. We submit that it was the intention of Congress in enacting the 1937 statutes that each employer and its respective employees should contribute the funds necessary to pay the benefits provided for those particular employees.

Inasmuch as the 1937 acts in question herein are to be considered as being in effect a single act, and inasmuch as it was the intention of congress that a particular employer and his employees are to provide the funds which are to be used for the retirement benefits accruing to those particular employees, and in consideration of the identical definitions of "employer" and "employee" in the two 1937 acts, and that there can not be an employer without a corresponding employee, if a particular carrier is not subject to the provisions of the Carriers' Taxing Act of 1937 it naturally follows, as an incident to the exclusion of the carrier, and as an incident only, that the employees of such carrier are not entitled to the benefits of the Railroad Retirement Acts of 1935 and 1937, and are not "employees" as defined in those acts.

The single issue in this suit, therefore, is whether the excise tax levied by the Carriers' Taxing Act of 1937 may be imposed upon the State of California as the operator of the State Belt Railroad. It seems clear to us that this question must be answered in the negative and that this court must conclude that the state as operator of said rail-

road is not within the purview of section 3a of the Carriers' Taxing Act of 1937.

It is a fundamental principle of statutory construction that where an act is susceptible of two interpretations, one which would require the court to declare the act unconstitutional, and the other which would uphold its constitutionality, a court will adopt that interpretation which will uphold the constitutionality of the act. If the court should conclude that the State of California in its operation of the State Belt Railroad is an employer within the purview of section 3a of the Carriers' Taxing Act of 1937, the act would be unconstitutional. (See Argument under Point I, *supra*.)

The employees of the State of California in its operation of the State Belt Railroad can not have any interest in the single issue presented to the court by the case at bar, and any effect upon such employees resulting from a determination by the court of that single issue arises incidentally by virtue of the court's conclusion as to whether the State of California is an employer within the meaning of section 3a of the Carriers' Taxing Act of 1937.

We submit, therefore, that such employees are not indispensable parties to this proceeding.

We have examined the cases cited by defendants in support of their theory that the employees are indispensable parties. In all of those cases the decision of the question before the court would

have a *direct* effect upon some property right of the absentees.

In *California vs. Southern Pacific Co.*, 157 U. S. 229, the matter in controversy was the ownership of certain tide lands, the title to which California was seeking to quiet as against the defendant. The city of Oakland and the Waterfront Company were grantees of certain similarly located lands, and their rights to those lands would be directly affected by the decision of the court.

In *Minnesota vs. Northern Securities Co.*, 184 U. S. 199, the absentee parties were two railroad companies whose functioning would be directly affected by the decree of the court; also the property of the stockholders of these companies would be directly affected by the decision.

In *New Mexico vs. Lane*, 243 U. S. 158, the absentee was the purchaser from the United States Government of the land involved in the controversy. Upon the decision of the court depended his property right in the land.

In all three of these cases, property rights of parties not joined would be directly affected by the decision of the court. This is a very different situation from the instant case, where the decision of the court on the main point in issue, to wit, the power of the federal government to tax a state, could not possibly affect any property right of any of the employees of the State Belt Railroad.

In *Texas vs. Interstate Com. Commission*, 258

U. S. 158, the controversy involved the validity of a federal statute authorizing the Labor Board to regulate working conditions and wages of employees of railroads engaged in interstate commerce. Before the action was brought the board had adjusted these matters and its orders had gone into effect. The decision of the court would have had a direct effect upon the wages and working conditions of the employees. That action is also readily distinguishable from the case at bar. Here a decision that the state is not taxable would not *directly* affect any right or privilege of the employees. The only effect upon them would be the failure of the Railroad Retirement Acts to operate. This would be a consequential and not a direct effect.

In *Barney vs. Baltimore*, 6 Wall. 280, there was a suit for partition of real estate in which certain persons who were part owners were not joined.

In *New Orleans Water Works vs. New Orleans*, 164 U. S. 471, an injunction was sought against the city of New Orleans to prevent the city from granting rights to any person other than complainant to conduct water through pipes in the city, the complainant claiming an exclusive privilege in this respect. The complaint alleged that the city had granted such privileges to other persons who were not joined as parties to the action.

In each of the cases which we have discussed above and upon which the defendants base their claim that the employees are indispensable parties,

we note that the absentee parties were primarily interested, and in fact in the case of *Texas vs. Interstate Commerce Commission, supra*, were the only parties interested, in the single issue presented to the court, whereas in the case at bar the employees of the State of California in the operation of the State Belt Railroad do not and can not have any interest in nor are they directly affected by any determination which this court may make on the single issue before the court, to wit, whether the excise tax imposed by the Carriers' Taxing Act of 1937 applies to the State of California in the operation of the State Belt Railroad.

III. THE BILL OF COMPLAINT STATES A CASE CALLING FOR THE INTERPOSITION OF A COURT OF EQUITY

In Point III, pages 25-37 of their brief, defendants make a labored effort to show that the bill of complaint herein is without equity, contending that:

- (1) Complainant will suffer no injury, irreparable or even substantial, and
- (2) Complainant has an adequate and complete remedy at law.

On pages 25, 26 and 27 of their brief defendants state that the only actions taken by defendants relative to the enforcement against complainant of the Railroad Retirement Act of 1937 and the Carriers' Taxing Act of 1937 are the letters of the Gen-

eral Counsel of the Railroad Retirement Board and the Commissioner of Internal Revenue set forth on pages 34-37 of the bill. We think it is not inappropriate, however, to state that on March 25, 1938, about the time the bill of complaint was being printed, a "Second Notice and Demand for Tax" was made upon the State of California operating the State Belt Railroad by the Collector of Internal Revenue for taxes in the amount of \$12,685.36, alleged to be due from the state under the Carriers' Taxing Act of 1937 for the period ending September 30, 1937, and for taxes in the amount of \$4,170.54 alleged to be due from the state under the same act for the period ending December 31, 1937. Both of these demands stated:

"If payment of the tax, penalty, and interest is not received within 10 days after the above date," (March 25, 1938) "collection with costs shall be made by *seizure and sale of property.*" (Italics ours.)

It must be assumed that the collector, in making this demand, acted under instructions of defendant Guy T. Helvering, Commissioner of Internal Revenue. (See 26 U. S. C. A. Sec. 1701, hereinabove quoted under our Point II-A.)

We call the court's attention to Exhibit "B" attached to the bill of complaint, which shows that a copy thereof was sent to the Collector of Internal Revenue at San Francisco and that he was acting

under and pursuant to the directions of the commissioner.

So much for the action and threatened action taken by the defendants.

A. Complainant Is Exposed to Irreparable Injury From the Action and Threatened Action of the Railroad Retirement Board and Has a Right to Resort to a Court of Equity to Prevent the Same, Notwithstanding the Provisions of Section 3224, Revised Statutes

Before discussing the injury, actual and threatened, incurred by the state by reason of the action and threatened action of defendants, we shall discuss some general principles relating to the right of complainant herein to resort to a court of equity in this case.

At the outset we will say that the complaint in this case is quite similar in its allegations to the complaint in *Alton Railroad Co. vs. Railroad Retirement Board*, 16 Fed. Supp. 955, particularly in its allegations of grounds for equitable relief. The court said at page 959:

"The defendants have moved to dismiss both the bill and the intervening petition upon the ground that equity has no jurisdiction, relying upon R. S. 3224 (26 U. S. C. A. Sec. 1543).

* * * * *

"The Supreme Court has held where the remedy at law is sufficient the act controls but that 'in cases where complainant shows that in addition to the illegality of an exaction in the

guise of a tax there exist *special* and *extraordinary circumstances* sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the Collector'. *Miller v. Standard Nut Margarine Company*, 284 U. S. 498, 52 S. Ct. 260, 263, 76 L. Ed. 422.

"I think the case at bar presents extraordinary circumstances, rendering relief in equity necessary. It is clear that if the tax be illegal, the carriers will suffer irreparable loss. There will be serious disruption between the carriers and their employees. Many employees will have relinquished their employment with the carriers within the next year upon the assumption of the permanency of their annuities provided for in the Retirement Act, and their positions will be filled by others. Rate adjustments may depend upon the validity of the tax. Reorganization plans will be delayed. Great accounting expense will be imposed upon the carriers, and this will be necessary from the fact that exact records are available only in the offices of the carriers. * * * For these reasons I think that equity has jurisdiction of this suit."

Turning now to the allegations of the bill of complaint as to grounds for equitable relief, we direct the court's attention to Paragraph VI, pages 15-17. On page 25 of the bill it is alleged that an early determination of the applicability of the Retirement Act of 1937 and the Carriers' Taxing Act of 1937 will prevent complainant from suffering irreparable damage which would otherwise result in case said

acts are later determined by the courts to have no application to complainant. Such irreparable loss to complainant would result

“from multiplicity of claims and suits by the employees of said State Belt Railroad to establish their rights to civil service status under the laws of the State of California, and their rights and privileges under the State Employees Retirement System of said state, which rights and privileges will have been surrendered by them in reliance upon the Railroad Retirement Act of 1937.”

The situation pictured by these allegations, briefly expressed, is this: The state as employer, in advance of a determination by this court, does not know whether its employees are subject to the State Retirement System or to the Federal Railroad Retirement System. Should the state, purporting to act as an employer, rely upon the provisions of the Railroad Retirement Acts of 1935 and 1937 and the Carriers' Taxing Act of 1937, and the Railroad Retirement Act of 1937 later be found not to apply to the State Belt Railroad, the state will be exposed to a multiplicity of claims and suits by these employees seeking to be restored to their rights and privileges under the state system.

It is difficult to conjure up a situation where there could exist more “special and extraordinary circumstances” justifying a recourse to a court of equity for relief.

On pages 27-29 of the bill of complaint it is alleged that the provisions of the Carriers' Taxing Act of

1937 and of the Railroad Retirement Act of 1937, if enforced against the State of California operating the State Belt Railroad, will cause the state to incur great expenses:

(1) On account of the necessity for deducting taxes from the compensation of the employee "as and when paid";

(2) On account of the calculations required to determine the average compensation earned by an employee in calendar months included in his years of service in the years 1924-1931; and

(3) On account of the necessity for determining a just and equitable basis for monthly compensation for the service period prior to January 1, 1937.

Heretofore there has been no necessity for any such accounting system. While it is impossible to state with any degree of accuracy the additional labor and expenses to which the state will be put in keeping additional records and making additional computations as hereinabove described, it is evident that all such expense will be irrecoverable in case the Carriers' Taxing Act of 1937 and the Railroad Retirement Act of 1937 shall later be found not to apply to the state. Clearly, therefore, the state will, in such case, suffer irreparable injury.

On page 28 of the bill of complaint it is also alleged that if the Railroad Retirement Act of 1937 and the Carriers' Taxing Act of 1937 are enforced against the state, additional records will have to be gathered and kept by the state in order to supply data to the

Railroad Retirement Board which will be necessary to enable that board to arrive at the amount of annuity to which the employees of the State Belt Railroad may be entitled.

Here, again, it is impossible to estimate the amount of labor or the cost which will be entailed by reason of the keeping of these additional records. It is obvious that records must be kept which have heretofore been entirely unnecessary and uncalled for. This expense also, if the above named acts should be found not applicable to the state can not be recovered and will cause the state irreparable injury.

We submit that the defendants have no basis for the contention made on pages 30-32 that the cost and effort of instituting and keeping these accounts would be negligible.

With respect to the necessity of keeping these additional accounts and records with no prospect of reimbursement therefor, it may also be said that these are "special and extraordinary circumstances justifying a recourse to equity for relief."

On pages 28, 29 and 30 of their brief defendants attempt to answer the allegation contained in Paragraph IX of the complaint that the defendant members of the Railroad Retirement Board have threatened to and unless enjoined by this court will require the complainant, through the Board of State Harbor Commissioners for San Francisco Harbor, to gather and keep the aforesaid records of the employees of complainant on said State Belt Rail-

road and will enforce against complainant certain penalties.

In answer, defendants contend that the Railroad Retirement Board is not authorized to prosecute criminal actions against the complainant for its failure to keep records and in support thereof cite the case of *Federal Trade Commission vs. Claire Furnace Company*, 274 U. S. 160, which case turned upon a provision of a statute which expressly authorized the Attorney General of the United States to enforce the criminal provisions of the act involved therein when requested to do so by the commission. However this may be, we call the court's attention to section 10 (b) 4 of the Railroad Retirement Act of 1937 which specifically authorizes a suit by the Railroad Retirement Board to compel obedience to any order of the board issued pursuant to said section. Under this authorization the Railroad Retirement Board undoubtedly has the power to bring an action in the United States district court directly against complainant to compel it to keep and produce records upon the order of that board. The contention of defendants that in case such suit is brought complainant could set up as a defense any ground which it is now urging upon this court as a basis for equitable relief is not well founded when we consider all the other bases for the exercise of original jurisdiction in equity which we have alleged hereinabove.

B. The Threat of the Commissioner of Internal Revenue and of His Subordinate, the Collector of Internal Revenue, to Collect Taxes From the Complainant and to Seize and Sell Its Property Exposes Complainant to Irreparable Injury. Complainant Has No Adequate Legal Remedy Through Payment of Taxes and a Suit for Refund, or Otherwise. Section 3224, Revised Statutes, Is Not Applicable Herein

In answer to defendants' contention on page 33 of their brief that the power to collect taxes is vested in the Collector of Internal Revenue for the First District of California, we refer to Point II-A of this brief, in which we have made it clear that the collector acts under the control and supervision of the commissioner and it must be considered that his acts are the acts of the commissioner. True it is that complainant could avoid penalties by paying the tax and suing for a refund. It is not true, however, that this court is without jurisdiction to enjoin the collection of the tax in question, for as we have hereinabove shown in Subdivision A of Point III, there are "special and extraordinary circumstances" from which it appears that payment and suit for a refund would irreparably injure the state.

The argument made on pages 34 and 35 of defendant's brief is not an answer to our claim that the state would suffer irreparable injury by the delay which would ensue upon payment of the tax

and suit for refund, since any suit at law for a refund could not possibly be decided within the time that would be required for determination of this original proceeding in this court, and in such an action for refund all of the relief prayed for in this proceeding in equity against both the Commissioner of Internal Revenue and the members of the Railroad Retirement Board could not possibly be obtained. As we have hereinabove shown, this additional relief is justified by "special and extraordinary circumstances justifying a recourse to equity for relief" which take this case out of the application of section 3224, Revised Statutes.

Alton Railroad Co. vs. Railroad Retirement
16 Fed. Supp. 955;

Miller vs. Standard Nut Margarine Company,
284 U. S. 498, 52 S. Ct. 260, 263, 76 L. Ed.
422.

On pages 35-37 of their brief defendants argue that the imposition upon the state and the State Belt Railroad of an income tax in the yearly amount alleged in the complaint, to wit, \$7,862.32, will not be a burden upon the state and the Harbor of San Francisco inasmuch as this amount is not in excess of the amount heretofore paid by the state under the State Employees' Retirement Act. The substantial equivalence of the amounts of these two kinds of contributions is admitted. Nevertheless, the proposed tax is none the less a burden upon the State of California and upon San Fran-

cisco Harbor. It is one thing for the state voluntarily to assume a burden; it is quite another to have a burden thrust upon it.

Furthermore, prior to a determination by some court as to the applicable system to the complainant, common prudence requires the state to set aside sufficient amounts to protect both the state and its employees under both systems.

We make no separate answer to Paragraph IV of defendants' brief wherein they contend that this suit is prohibited by section 3224 of the Revised Statutes, as we have fully answered this argument under Point III-B.

Therefore we submit that this court may exercise its equitable jurisdiction.

IV. THIS IS NOT A SUIT AGAINST THE UNITED STATES BECAUSE THE UNITED STATES IS NOT THE REAL DEFENDANT

On pages 41-46 of their brief it is argued by defendants that the case at bar is not maintainable in this court because the United States is the real defendant and it may not be sued without its consent, even by a state.

In support of this contention the defendants cite at page 41 of their brief numerous cases which support one or the other of the two following principles:

(a) The United States is the real defendant and can not be sued without its consent if a deter-

mination of the issue presented will affect property the title to which is in the United States.

Morrison vs. Work, 266 U. S. 481;
New Mexico vs. Lane, 243 U. S. 52;
Oregon vs. Hitchcock, 202 U. S. 60;
Minnesota vs. Hitchcock, 185 U. S. 373;
Cummings vs. Deutsche Bank, 300 U. S. 115;
Louisiana vs. Garfield, 211 U. S. 70.

(b) The United States is the real defendant and can not be sued without its consent if an action is commenced against an officer acting pursuant to a constitutional statute, who is not acting in excess or abuse of his power.

Lambert Co. vs. Baltimore & Ohio Railroad Co., 258 U. S. 377, 382;
Texas vs. Interstate Com. Comm., 258 U. S. 158;
North Dakota vs. Chicago & N. W. Ry. Co., 257 U. S. 485;
Wells vs. Roper, 246 U. S. 335;
Louisiana vs. McAdoo, 234 U. S. 627;
Kansas vs. Colorado, 185 U. S. 125.

We have included in neither of these classifications the following cases for the reason that although the question of the right to sue the United States was raised by counsel in these cases, the decision in each case rested upon other grounds:

Arizona vs. California, 283 U. S. 423;
Massachusetts vs. Mellon, 262 U. S. 447.

Conceding the correctness of the two principles which the defendants rely upon, nevertheless we call

the court's attention to a further principle which we feel is controlling under the circumstances of the present case, to wit: It is a settled doctrine that a suit against individuals purporting to act as officers of a government, for the purpose of preventing them as such officers from enforcing an unconstitutional enactment to the injury of the rights of a party plaintiff, is not a suit against that government.

Poindexter vs. Greenhow, 114 U. S. 270, 330, 5 S. Ct. 903, 962, 29 L. Ed. 185, 207;

Atchison, T. & S. F. R. Co. vs. O'Connor, 223 U. S. 280, 32 S. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913 C, 1050;

Reagan vs. Farmers' L. & T. Co., 154 U. S. 362, 14 S. Ct. 1047, 38 L. Ed. 1014;

Smyth vs. Ames, 169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819;

Haskins Bros. & Co. vs. Morgenthau, 85 Fed. (2d) 677, 683, 684;

Philadelphia Co. vs. Stimson, 223 U. S. 605;

Goltra vs. Weeks, 271 U. S. 536.

Under Point I, *supra*, we feel that we have established that the State of California is not subject to the Carriers' Taxing Act of 1937 and to so hold would render that act unconstitutional. We call the court's attention to the allegations found in Paragraph VIII of the bill of complaint, wherein we have alleged that to so construe the act would render the same unconstitutional. Further, we call the court's attention to the various allegations in Paragraphs

IX, X and XI of the bill of complaint relative to the threats and actions taken by the defendants herein, which threats and actions have purportedly been made and done by the defendants in their official capacities. We expressly call the court's attention to the threat made on March 25, 1938, by the Collector of Internal Revenue, acting pursuant to directions issued by the Commissioner of Internal Revenue, to seize and sell property of the complainant to effect collection of the taxes alleged to be due from complainant herein.

We submit that the aforesaid threats and action or any action which any of the defendants may hereafter take pursuant to their announced intention to enforce the aforesaid acts against complainant pursuant to the unconstitutional (if applied to complainant herein) Carriers' Taxing Act of 1937 is not an action by those defendants in their official capacities and is not an action of the United States, but is merely an action taken by said defendants in their personal capacities. Furthermore, we submit that the United States is not the real defendant in this action.

CONCLUSION

For the reasons hereinabove in this brief assigned, it is respectfully submitted that the motion of complainant for leave to file bill of complaint herein should be granted; that the defendants should be required to appear and answer the bill of complaint;

and that complainant should be granted the relief prayed for in said bill of complaint.

Respectfully submitted.

U. S. WEBB,

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State of California,

H. H. LINNEY,

Deputy Attorney General,

LUCAS E. KILKENNY,

Deputy Attorney General,

JAMES J. ARDITTO,

Deputy Attorney General,

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938
No. 13 Original

STATE OF CALIFORNIA,

vs. *Complainant,*

MURRAY W. LATIMER, JAMES A.
DAILEY and LEE M. EDDY, indi-
vidually and as members of the
Railroad Retirement Board, and
EDY T. HELVERING, indi-
vidually and as Commissioner of
Internal Revenue,

Defendants.

Supplemental Brief of Complainant State of California
on Defendants' Motion to Dismiss Bill of Complaint

THE STATE OF CALIFORNIA
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In the Supreme Court

OF THE

UNITED STATES

OCTOBER TERM, 1938

No. 13 Original

STATE OF CALIFORNIA,

vs. *Complainant,*

MURRAY W. LATIMER, JAMES A.
DAILEY and LEE M. EDDY, indi-
vidually and as members of the
Railroad Retirement Board, and
GUY T. HELVERING, indi-
vidually and as Commissioner of
Internal Revenue,

Defendants.

Supplemental Brief of Complainant State of California
on Defendants' Motion to Dismiss Bill of Complaint

STATEMENT REGARDING THE PLEADINGS

These proceedings were initiated by complainant by lodging its bill of complaint in this court together with a motion for leave to file the same. Subsequently and on April 11, 1938, a rule was issued requiring defendants to show cause why

leave to file the bill of complaint should not be granted. Defendants in their response opposed the motion for leave to file and filed therewith a brief in support of such opposition. In reply complainant filed its brief in support of motion for leave to file bill of complaint. On May 16, 1938, leave to file the bill was granted and process was made returnable on October 3, 1938. On the latter date defendants filed a motion to dismiss bill of complaint, supported by points and authorities, together with their answer to the bill of complaint.

At the outset, defendants in their memorandum suggest that the suit be dismissed as to defendant Dailey in view of the fact that his term of office expired on August 29, 1938, and that no successor has yet been appointed. In this connection we request that the court take no action upon this suggestion at this time, but that when a successor to defendant Dailey is appointed the court permit complainant to substitute such successor in defendant Dailey's place and stead.

We call the court's attention to the Act of Congress of February 13, 1925 (C. 229, 43 Stat. 936, 941, U. S. C. Tit. 28, Section 780; 28 U. S. C. A. 780) reading in part as follows:

“* * * Where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, * * * and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be

competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, * * *

FOREWORD

On page 4 of their memorandum of points and authorities defendants contend that the issues raised by their response to the rule to show cause were not adjudged against them by the decision of the court to allow complainant to file its bill of complaint, and that the same issues may again be presented to the court by the present motion to dismiss.

Defendants rely upon cases which set forth the procedure formerly followed by this court in original actions in which the complainant was a sovereign state. Under that procedure the state was granted leave to file, as of course, and without prejudice to the defendant's raising any jurisdictional objections through the medium of a motion to dismiss. See

Louisiana vs. Texas, 176 U. S. 1;

Washington vs. Northern Securities Co., 185 U. S. 254;

Kansas vs. United States, 204 U. S. 331, 337.

In the last named case there was an objection by the defendant, the United States, on the ground

of lack of jurisdiction. In granting leave to file, the court said:

“As such an application by a state is usually granted as of course, we thought it wiser to allow the bill to be filed but reserved to the United States the right to object to the jurisdiction thereafter, and the words ‘without prejudice’ were inserted in the order.”

While defendants also rely upon *Georgia vs. Morgenthau*, No. 16 Original, 296 U. S. 544, we call to the court's attention the fact that the complainant, the State of Georgia, subsequent to the filing of its complaint and prior to an argument on defendant's motion to dismiss, voluntarily dismissed its bill of complaint (297 U. S. 726).

It would appear that since the case of *Florida vs. Mellon*, 273 U. S. 12, a new practice has been developed whereby this court orders a rule to issue on the question of granting leave to file, requiring defendant to appear and show cause why leave to file the bill of complaint should not be granted. Under this procedure, which was followed in the instant case, the defendant appears on the return day of the rule, both parties then file briefs on the question, and the court takes the matter under advisement, disposing of such jurisdictional questions as there may be and either granting or denying leave to file.

Having followed this procedure and having granted leave to file the bill in the case now before the court, it would appear that the court has already

disposed of such jurisdictional objections as were called to the court's attention by the defendants in response to the rule to show cause.

Nevertheless, since defendants have renewed in their motion to dismiss their objections to the complaint on jurisdictional grounds, and have adopted by reference the brief which they have heretofore submitted in this cause in support of their response to the rule to show cause, and have further discussed additional matters not covered in that brief, we think that it is only proper that the complainant should at this time refer the court to complainant's brief which was submitted in support of its motion for leave to file, in which we met the jurisdictional issues presented by defendants at that time. In addition to this brief we now respectfully submit to the court the following argument in response to the additional matters discussed by defendants in their memorandum in support of motion to dismiss the bill of complaint.

ARGUMENT

I

Defendants' Citizenship Affords a Basis for the Jurisdiction of this Court

Under Point I of the additional argument made by defendants in support of their motion to dismiss, it is argued that the citizenship of defendants affords no basis for the jurisdiction of this court.

It is argued that defendants "can and will act only as officials"; that if one of the defendants should resign and his office be filled by a citizen of California, "the essential nature of the controversy would remain unaltered and the real parties in interest would remain the same"; citing *Minnesota vs. Hitchcock*, 185 U. S. 373, 383-384; and that it was held in *Texas vs. Interstate Commerce Commission*, 258 U. S. 158, 160, that "governmental agencies are not citizens of any state but bear the same relation to one state as to another without regard to the citizenship of their personnel."

In answer we point out that the defendants Latimer, Dailey and Eddy are sued "individually and as members of the Railroad Retirement Board," and that Guy T. Helvering is sued "individually and as Commissioner of Internal Revenue."

It is to be noted that the suit is not brought against the Railroad Retirement Board as a board, neither is suit brought against any of the officials in his official capacity. This is a suit against the individuals named, and it is alleged in the complaint that such individuals are purporting to act in their respective official capacities.

In *Texas vs. Interstate Commerce Commission*, *supra*, the court at page 160 said:

"But both defendants are sued as corporate entities created by the United States for governmental purpose; and, if that be their status, they are not citizens of any state, but have the same relation to one state as to another."

We do not question this principle but point out that in the case at bar the complainant has not sued any corporate entity, board or agency of the United States.

In *Minnesota vs. Hitchcock*, *supra*, the State of Minnesota, pursuant to a congressional act, named the then Secretary of the Interior as a proper party defendant and claimed that this court had original jurisdiction because that officer was a citizen of Missouri. In answer to this contention the court at pages 383-384 said:

"To that it may be replied that there is no real controversy between the state, the plaintiff, and the defendants as individuals; that the latter, merely as citizens, have no interest in the controversy for or against the plaintiff; that in case either of the defendants should die or resign and a citizen of Minnesota be appointed in his place, the jurisdiction of the court would cease and this, although the real parties in interest remain the same."

In the case now before the court the real controversy arises because the defendants as citizens of their respective states, purporting to act as officials, have illegally attempted to apply the federal acts involved in the action to the complainant herein. The acts of which the State of California complains are the unauthorized acts of these citizens of other states, acting under color of official authority, but wholly outside of the proper scope of such authority.

The defendants herein, in acting outside of the scope of their authority, can be interested in the controversy only as citizens, for the obvious reason that as officers of the United States they have no interest in the acts done by them without official authorization.

If a resident of California were appointed in place of defendant Dailey, whose term of office has expired, the situation would be different from that which existed in *Minnesota vs. Hitchcock, supra*, because in that case the real controversy was between the state and the United States, the latter being the real party in interest. Here, however, while the nature of the controversy would remain the same if a resident of California took the place of defendant Dailey, the real parties in interest would change, because the United States is not the real party in interest when its officials act outside of their authority. On pages 42 and 43 of complainant's brief in support of motion for leave to file bill of complaint it is shown that the United States is not the real party in interest where an officer acts in excess and abuse of his power. To the cases there cited may be added *Allen vs. Regents of University System*, 304 U. S. 439, 55 S. Ct. Rep. 980, 982. In that case the court, citing cases, said:

"We are not unmindful of the principle that suits against officers to restrain action in excess of their authority or in violation of statutory or constitutional provisions are in their nature personal."

II

This Suit Is Not Prohibited by Section 3224, Revised Statutes

At pages 34-39, inclusive, of complainant's brief in support of motion to file bill of complaint it is shown that section 3224, Revised Statutes, does not forbid maintenance of this suit. That conclusion is in no manner affected by the decision in *Allen vs. Regents*, 304 U. S. 439.

We submit that the court in *Allen vs. Regents* recognizes the long accepted doctrine that there are two exceptions to the provision of section 3224, Revised Statutes. The first exception is that section 3224, Revised Statutes, does not apply in the case where the complainant shows that in addition to the illegality of an exaction in the guise of a *tax* there exist special and extraordinary circumstances.

The second exception is that section 3224, Revised Statutes, does not apply where there is an attempt to impose a penalty as distinguished from a tax.

We note in reading the *Allen* case that the court held that the lower federal court rightly entertained proceedings therein either on the theory that there was an action to collect a tax or on the theory that the action was one to enjoin the collection of a penalty for failure to collect a tax.

III

The State of California, Complainant Herein, In the Construction, Maintenance, Operation, Management and Control of the State Belt Railroad, Is Immune From the Excise Tax Sought to Be Levied Pursuant to the Carriers' Taxing Act of 1937

In Point III of their additional points and authorities defendants seek to establish that the issues presented by complainant have been decided against it by previous decisions of this court. They refer to pp. 46-50 of their brief in response to the rule to show cause, where they claim to have shown that previous decisions of this court have disposed of all questions presented by the complaint. They then cite the recent cases of *Helvering vs. Gerhardt*, 304 U. S. 405, 58 S. Ct. Rep. 969; which they claim shows the narrow room for any claim of immunity against federal taxation, and *Allen vs. Regents*, 304 U. S. 439, 58 S. Ct. Rep. 980, which defendants refer to as clarifying the principle that a business enterprise, even though conducted by a state, can not share the sovereign immunity against taxation.

A. Analysis of *Helvering vs. Gerhardt*.

In the case of *Helvering vs. Gerhardt*, *supra*, the question for decision was whether the imposition of a federal income tax for the calendar years 1932 and 1933 on salaries received by Gerhardt and others as employees of the Port of New York Authority placed an unconstitutional burden on the states of New York and New Jersey.

In the decision of the court many of the cases bearing upon the immunity of state instrumentalities from federal taxation were reviewed and considered. The legislation establishing the Port Authority was reviewed and the main purposes and powers of the Authority set forth. This court laid down the principle that any constitutional restriction upon the taxing power granted to Congress, so far as it can be properly raised by implication, should be narrowly limited, and stated:

"In tacit recognition of the limitation which the very nature of our federal system imposes on state immunity from taxation in order to avoid an everexpanding encroachment upon the federal taxing power, this Court has refused to enlarge the immunity substantially beyond those limits marked out in *Collector vs. Day* (11 Wall. 113, 20 L. Ed. 122). It has been sustained where, as in *Collector vs. Day*, the function involved was one thought to be essential to the maintenance of a state government."

The rule thus announced as to immunity of the functions of a state government from federal taxation is stated somewhat differently from the rule applying to the same subject, as stated in *Helvering vs. Powers*, 293 U. S. 214, where the court said:

"The principle of immunity has inherent limitations. And one of these limitations is that the state cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a *departure from usual governmental functions*, and to which, by rea-

son of their nature, the federal taxing power would normally extend."

We do not think, however, that this new statement of the rule limits the state functions which have hitherto been considered as immune from federal taxation.

The court further said that the judicial pronouncements marking the boundary of state immunity definitely establish two guiding principles of limitation for holding the tax immunity of state instrumentalities to its proper function. The first of these principles, dependent upon *the nature of the function* being performed by the state or in its behalf, excludes from the immunity activities thought *not to be essential to the preservation of state governments* even though the tax be collected from the state treasury. As illustrations of activities carried on by a state which this court decided not to be essential for the preservation of state government, the court cited the carrying on of a liquor business by the state, as illustrated in *South Carolina vs. United States*, 199 U. S. 437, 26 S. Ct. Rep. 110, 50 L. Ed. 261, and in *Ohio vs. Helvering*, 292 U. S. 360, 54 S. Ct. Rep. 725, 78 L. Ed. 1307; and the operation of a privately owned street railroad as illustrated in *Helvering vs. Powers*, 293 U. S. 214, 55 S. Ct. Rep. 171, 79 L. Ed. 91.

The second principle was referred to in the decision as exemplified by those cases where the tax laid upon *individuals* affects the state only as the

burden is passed on to it by the taxpayer and the burden on the state is so speculative and uncertain that, if allowed, it would restrict the federal taxing power without affording any corresponding tangible protection to the state government.

Metcalf & Eddy vs. Mitchell, 269 U. S. 514;
46 S. Ct. Rep. 172, 70 L. Ed. 384;

Willcuts vs. Bunn, 282 U. S. 216, 51 S. Ct. Rep. 175, 75 L. Ed. 304.

In applying these principles to the case before the court the statement was made that the challenged income taxes were upon net incomes of respondents.

“derived from their employment in common occupations not shown to be different in their methods or duties from those of similar employees in private industry.”

We point out that *Helvering vs. Gerhardt* does not involve a tax upon a state or a political subdivision of a state or upon a state instrumentality. In this connection the court said:

“*Expressing no opinion whether a federal tax may be imposed upon the Port Authority itself with respect to its receipt of income or its other activities, we decide only that the present tax neither precludes nor threatens unreasonably to obstruct any function essential to the continued existence of the state government.*”

The decision therefore is not authority for the proposition that the Carriers' Taxing Act of 1937

applies to the State of California as owner of the State Belt Railroad.

Indeed, it is strongly intimated by the court that there may be cases where the employees of a state engaged in carrying on the function of a state government may be taxed, when the state itself or the particular function exercised may be immune from a tax. Witness the words of the court, as follows:

“* * * even though the function be thought important enough to demand immunity from a tax upon the state itself, it is not necessarily protected from a tax which well may be substantially or entirely absorbed by private persons.”

The difficulty in determining whether a state in exercising a particular function is subject to federal taxation does not arise from the statement of the general rule governing such immunity but from the application of the rule to the particular function sought to be taxed.

B. Analysis of *Allen vs. Regents etc.*, 304 U. S. 439, 58 S. Ct. Rep. 980.

In their supplemental brief, defendants refer to *Allen vs. Regents, supra*, as “further clarifying the principle that a business enterprise, even though conducted by a state, can not share the sovereign immunity against taxation.”

Applying the principle upon which *South Carolina vs. United States, supra*, was decided, to the facts of *Allen vs. Regents*, this court said:

"The important fact is that the State, in order to raise funds for public purposes, has embarked in a business having the incidents of similar enterprises usually prosecuted for private gain. If it be conceded that the education of its prospective citizens is an essential governmental function of Georgia, as necessary to the preservation of the State as is the maintenance of its executive, legislative, and judicial branches, it does not follow that if the State elects to provide the funds for any of these purposes by conducting a business, the application of the avails in aid of necessary governmental functions withdraws the business from the field of federal taxation.

"Under the test laid down in *Helvering vs. Gerhardt*, 304 U. S. 405, 58 S. Ct. 969, 82 L. Ed. —, decided this day, however essential a system of public education to the existence of the State, the conduct of exhibitions for admissions paid by the public is not such a function of state government as to be free from the burden of a non-discriminatory tax laid on all admissions to public exhibitions for which an admission fee is charged."

We concur that this statement is indeed a clarification, if any were needed, of the rule of the case of *South Carolina vs. United States*, *supra*. Still we must say as we have said with respect to *Helvering vs. Gerhardt*, *supra*, that there is no difficulty in understanding the general rule; the problem to be solved is the proper application of the rule.

There was no question in the case of *Allen vs. Regents* that the athletic exhibitions which were burdened by the tax were not essentially different in character from athletic contests carried on by private promoters. The facts of the case showed that the contests were conducted for profit, and that the stadia of the University of Georgia and the Georgia School of Technology were, to a great extent, paid for by the income derived from the admissions upon which the tax was levied. The profits were used to finance an admittedly governmental function, to-wit, the education of prospective citizens of Georgia.

The business of conducting athletic contests, considered taxable in this case, is in striking contrast to the operation of the State Belt Railroad and the Harbor of San Francisco, of which the railroad is an indispensable part, in that:

- (1) The harbor and the railroad are not conducted for profit, since the rates charged by these instrumentalities for services are limited by law to amounts sufficient to pay expenses. (Harbors and Navigation Code of California, Section 3084.)

- (2) The operation of harbors and terminal railroads connected therewith is historically and traditionally a governmental function. (Pp. 15-18, brief in support of motion for leave to file bill of complaint.)

- (3) There is no private business conducted in a comparable manner.

On pages 14 and 15 of our brief in support of motion for leave to file bill of complaint we considered the cases of *South Carolina vs. United States*, *supra*, *Ohio vs. Helvering*, *supra*, and *Helvering vs. Powers*, *supra*, and showed that there is a clear distinction between the state functions involved in those cases, and the administration of the Harbor of San Francisco, including the operation of the State Belt Railroad, which is the function involved in the case at bar.

On pages 8 and 9 of that brief, by a reference to the Harbors and Navigation Code of the State of California, made a part of the complaint, we showed the nature of the instrumentality of the state which operates San Francisco Harbor and the State Belt Railroad. We also referred on page 9 to the decisions of this court, the Supreme Court of the State of California, and the Board of Tax Appeals holding that the Board of State Harbor Commissioners, in administering the harbor and the railroad, is engaged in performing governmental functions. On pages 10 and 11 of the brief we gave a partial enumeration of the powers of a governmental nature exercised by said board and showed that the State Belt Railroad is not a separate entity from the Board of State Harbor Commissioners, but is simply one of the instrumentalities used by it in administering the San Francisco Harbor.

In the above discussion we submit we have shown clearly that there is a wide difference between the

functions exercised by the Board of State Harbor Commissioners, including the operation of the State Belt Railroad, and the conducting of a liquor business, which was involved in *South Carolina vs. United States, supra*, and *Ohio vs. Helvering, supra*, and the administration of the railroad, which was the subject of the action in *Helvering vs. Powers*.

On page 15 of our brief hereinabove mentioned we made the point that governments have universally exercised the function of developing and operating their ports and harbors. - In this connection we referred to the case of *Commissioner vs. Ten Eyck*, 76 Fed. (2d) 515, and we again respectfully call the court's attention to the learned discussion by the court in that case and its holding that port and harbor developments have historically been regarded as governmental functions, and that the operation of a railroad by a port commission as one of its instrumentalities does not impress such railroad with the character of a private enterprise, but on the contrary that in operating such a railroad the state is engaged in "a usual governmental function as distinguished from a proprietary function."

IV

Unconstitutionality, in General, of Both 1937 Acts

For the purposes of this case we have so far argued that the Railroad Retirement Acts of 1935 and 1937 and the Carriers' Taxing Act of 1937 are unconstitutional if held to apply to the State of

California in its operation of the State Belt Railroad.

It may not be amiss for us to say that in our opinion these two acts are unconstitutional in all events.

The 1934 Act, the forerunner of the later acts, was held by this court to be unconstitutional in *Railroad Retirement Board vs. Alton Railroad*, 295 U. S. 330 (1935).

In that act (Act of June 27, 1934, Ch. 868, 48 Stat. 1283) the retirement features were combined with the taxing features.

This court found the act to be unconstitutional on the following grounds:

“(a) That the provisions of the act which disregard the private and separate ownership of the several respondents treat them all as a single employer and pool their assets regardless of their individual obligation, cannot be justified as consistent with due process;

“(b) Because the act is unreasonably and unconscionably burdensome and oppressive upon the respondents;

“(c) Because several of the inseparable provisions of the act contravene the due process of the law clause of the fifth amendment;

“(d) That even if the act could survive the loss of unconstitutional features already discussed it is bad for a reason which goes to the heart of the law, namely that the act is not in purpose or effect a regulation of interstate commerce within the meaning of the Constitution.”

In 1935 Congress enacted a statute establishing a retirement system for employees of carriers (49 Stat. 967, 45 U. S. C. A. Section 215 et seq.). In this act there were no provisions for a tax. However, the same Congress enacted a statute providing for the levy of an excise tax upon carrier employers and an income tax upon carrier employees (49 Stat. 974, 45 U. S. C. A. Section 241 et seq.).

In the case of *Alton Railroad Company vs. Railroad Retirement Board*, 16 Fed. Supp. 955, these two acts came before the District Court of the United States for the District of Columbia, and in a decision handed down on June 26, 1936, that court held that the two acts were inseparable parts of a whole; that Congress would not have enacted one without the other, and that the taxing act transcended the powers of Congress and was unconstitutional as applied to the carriers.

Our information is that this case was on its way to an appellate court when Congress enacted the two acts here in question, namely, the Railroad Retirement Act of 1937 and the Carriers' Taxing Act of 1937.

So far as we are advised, the constitutionality of these two acts has not been raised in any court proceeding. If so, apparently the case has not yet reached this court.

Even if it be conceded that objections (b) and (c) to the 1934 act, as stated above, have been overcome in the 1937 acts, we believe that objections (a) and

(d) are as applicable to the 1937 acts as they were to the 1934 act.

The 1937 acts disregard the private and separate ownership of the carriers and treat them as a single employer, their contributions being pooled regardless of their individual obligations. In the *Alton* case this court said that such provisions could not be justified as consistent with the due process clause of the constitution.

Objection (d) above, which this court in the *Alton* case said went to the heart of the law, has not been removed.

Congress has again attempted, through the medium of two acts instead of one, to carry out purposes which can not be effected through a regulation of interstate commerce within the meaning of the constitution.

To put the matter in a different form, Congress has again attempted to accomplish social security objectives for railway employees under the guise of regulating interstate commerce. This court held in the *Alton* case that the constitution does not justify such effort.

In conclusion, we submit that our Bill of Complaint presents an equitable issue cognizable by this court and in no true sense controverted by the pleadings or briefs of the defendants.

We respectfully pray, therefore, that the court overrule the motion to dismiss and determine this cause upon its merits:

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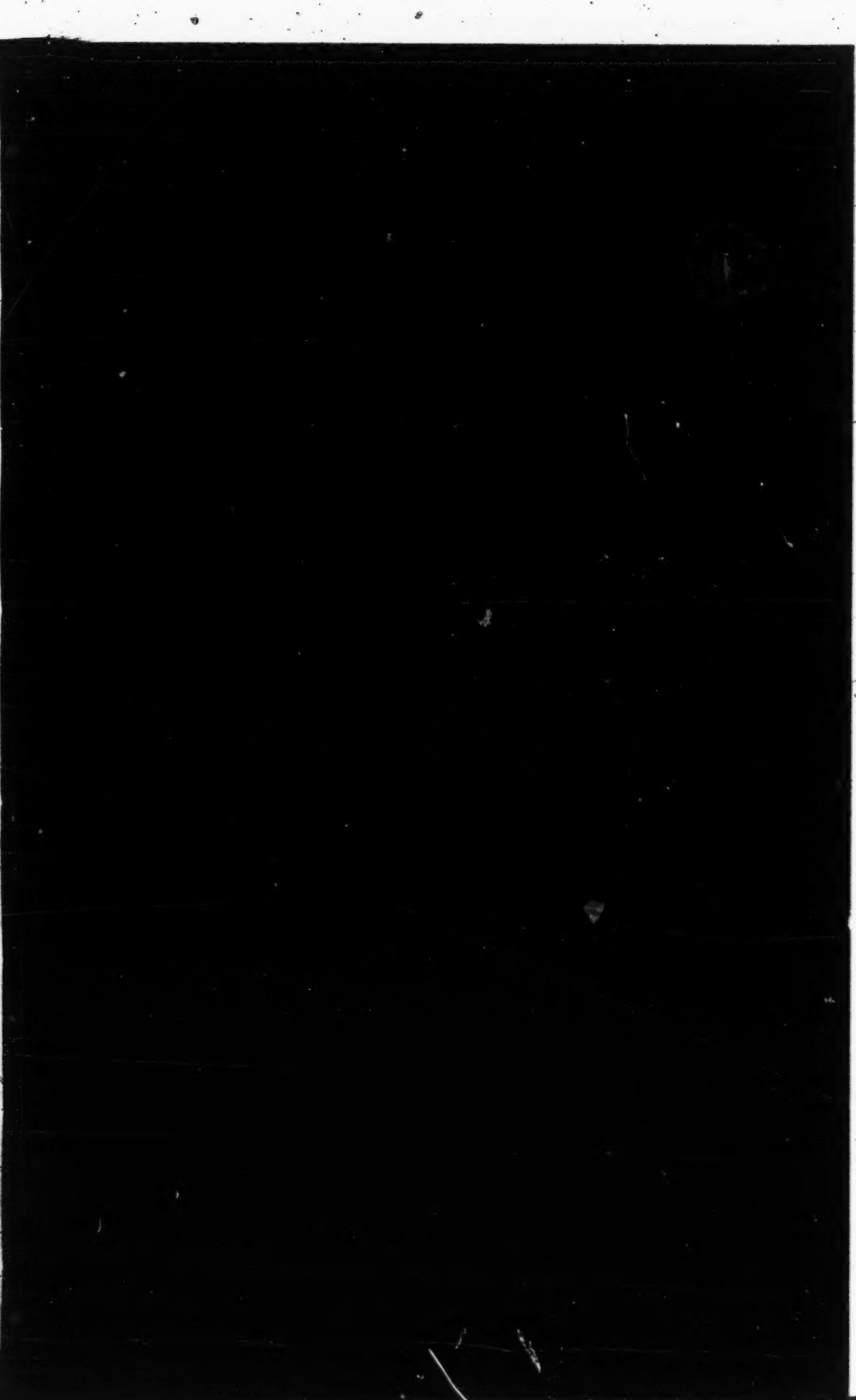
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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 13, Original

THE STATE OF CALIFORNIA, COMPLAINANT

v.

MURRAY W. LATIMER, JAMES A. DAILEY, AND LEE
M. EDDY, INDIVIDUALLY AND AS MEMBERS OF THE
RAILROAD RETIREMENT BOARD, AND GUY T. HEL-
VERING, INDIVIDUALLY AND AS COMMISSIONER OF
INTERNAL REVENUE

MOTION TO DISMISS BILL OF COMPLAINT, MEMORANDUM
IN SUPPORT OF MOTION TO DISMISS, AND ANSWER TO
BILL OF COMPLAINT SUBJECT TO MOTION TO DISMISS

MOTION TO DISMISS BILL OF COMPLAINT

*To the Chief Justice and the Associate Justices of
the Supreme Court of the United States:*

Come now the defendants above-named, by the
Solicitor General, and move that the bill of com-
plaint herein be dismissed for the reasons that:

A. The individual citizenship of the defendants
can form no basis for original jurisdiction in this
Court. Defendants can and will act only as offi-
cials of the United States; and as officials they are

citizens of no State but have the same relation to one State as to another.

B. The Collector of Internal Revenue for the First District of California and the employees of the State Belt Railroad have not been joined as defendants, and they are indispensable parties in whose absence this Court should not proceed.

C. The cause may not be maintained in this Court, since the Collector of Internal Revenue for the First District of California, a citizen of California, should be made a party, and to join him would deprive this Court of original jurisdiction.

D. The cause may not be maintained in this Court, since the employees of the State Belt Railroad, citizens of California, in whose absence this Court should decline to give equitable relief, should be made parties, and to join any of them would deprive this Court of original jurisdiction in this cause.

E. The bill of complaint is without equity because it appears from the allegations thereof that complainant will suffer no injury, irreparable or even substantial, from any action taken or threatened by the defendants.

F. Complainant has an adequate and complete legal remedy by the payment of the questioned taxes which have accrued under the Carriers Taxing Act of 1937, followed by a claim and a suit for a refund, and by contesting the validity of orders issued under the Railroad Retirement Acts in judicial proceedings provided for in those Acts.

G. The bill of complaint requests this Court to grant relief in contravention of Section 3224 of the Revised Statutes, in that it seeks to obtain an injunction against the collection of a federal tax.

H. This suit is in substance and effect against the United States, which is the real party in interest and hence an indispensable party. It may not be sued without its consent and has not consented to this suit or waived its immunity from suit.

I. Even though it be assumed that the bill of complaint alleges threatened action of the defendants which would afford grounds of equitable relief if such action were unlawful, nevertheless the bill of complaint should be dismissed on the ground that all action alleged to be threatened is wholly lawful.

Wherefore, the defendants pray that the bill of complaint be dismissed, with costs to the defendants.

ROBERT H. JACKSON,
Solicitor General.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS BILL OF COMPLAINT

STATE OF THE PLEADINGS

Upon motion by complainant for leave to file its bill of complaint, a rule was issued on April 11, 1938, requiring the defendants to show cause why leave to file the bill of complaint herein should not be granted. Response having been made by the defendants through the Solicitor General, leave to file the bill was granted on May 16, 1938, and process was made returnable on October 3, 1938.

SUGGESTION AS TO DEFENDANT DAILEY

As indicated in Article II of the answer to the bill of complaint, filed herewith, the term of office of the defendant Dailey expired on August 29, 1938. No successor has yet been appointed. There is, therefore, no occasion for continuing this suit against the defendant Dailey, and the Court may choose to dismiss the bill as to him irrespective of any action taken as to the other defendants.

STATEMENT

The issues raised by the defendants in their response to the rule to show cause were not adjudged against them by the decision of the Court to allow complainant to file its bill of complaint,¹ and the

¹ *Louisiana v. Texas*, 176 U. S. 1; *Washington v. Northern Securities Co.*, 185 U. S. 254; *Kansas v. United States*, 204 U. S. 331; *Georgia v. Morgenthau*, No. 16, Original, October Term, 1935 (Journal entry for January 20, 1936, ordering motion to dismiss and answer filed and setting argument on motion to dismiss).

same issues may again be presented to the Court by the present motion to dismiss. Therefore, in support of the grounds upon which the motion to dismiss is based, defendants respectfully refer the Court to the brief submitted in this cause on their behalf by the Solicitor General in response to the rule to show cause why leave to file the bill of complaint should not be granted. Additional matters not covered in that brief are briefly discussed herein.

ARGUMENT

I

DEFENDANTS' CITIZENSHIP AFFORDS NO BASIS FOR THE JURISDICTION OF THIS COURT

Complainant seeks to establish original jurisdiction in this Court by alleging that the individuals named as defendants are citizens of states other than California, in order that this controversy should appear to be one between a state and citizens of another state (Constitution, Article III, Section 2, Clause 1). But defendants can and will act only as officials; and as individuals they clearly have no interest in the Railroad Retirement Acts and the Carriers Taxing Act, as is abundantly illustrated by the futility of continuing this suit for an injunction against the defendant Dailey who, as indicated in Article II of the answer filed herewith, is no longer a member of the Railroad Retirement Board. None of the acts which complainant alleges that defendants have done or will do in the administration of these statutes, would, even if

such statutes are later determined to be inapplicable to complainant, subject defendants to personal tort liability; hence, defendants do not have even that individual interest in sustaining the authority for their conduct which would exist in the case of officers of the government acting under circumstances which would subject them to personal liability in tort for conduct not sustained by lawful authority. That defendants are not involved here in their capacities as citizens of states other than California is demonstrable from the fact that if one of them should resign and his office be filled by a citizen of California, the essential nature of the controversy would remain unaltered and the real parties in interest would remain the same. *Minnesota v. Hitchcock*, 185 U. S. 373, 383-384. The real controversy is whether or not the Railroad Retirement Acts and the Carriers Taxing Act are applicable to the State of California in its operation of the State Belt Railroad, and the real parties in interest are the State and the officials charged by law with the enforcement of those Acts. This Court said in *Texas v. Interstate Commerce Commission*, 258 U. S. 158, 160, that governmental agencies are not citizens of any state but bear the same relation to one state as to another without regard to the citizenship of their personnel on the basis of which Texas asserted jurisdiction in that case. There is manifestly no real distinction between a suit against the Board, such as was involved in *Texas v. Interstate Commerce Commis-*

sion, supra, and the present suit against all of the members of the Board. That complainant itself explicitly recognizes that its suit is in no real sense against the defendants as individuals is shown by the fact that relief is prayed for not only against the defendants but also against their successors in office.

II

THIS SUIT IS PROHIBITED BY SECTION 3224 OF THE REVISED STATUTES

At pages 38-40 of the brief in response to the rule to show cause it is shown that Section 3224 of the Revised Statutes forbids maintenance of this suit. That conclusion is in no manner affected by the recent decision in *Allen v. Regents*, 304 U. S. 439.

This Court in the *Regents* case held that the federal courts could maintain proceedings to enjoin collection of the amount said to be due from the state instrumentality in respect of admissions taxes imposed on those who attended its athletic contests. The opinion seems to have rested the decision on the conclusion that "the assessment is not of a tax payable by respondent but of a penalty for failure to collect it from another" (p. 449). Because "no part of the sum collected was a tax" and "the assessment was in truth the imposition of a penalty for failure to exact a tax on behalf of the United States," the state was held "entitled to have a determination of the question whether such burden is imposed by the statute as construed and applied"

(p. 448). Since there was no clear provision for claims for refund and suits for recovery, and the state "is not bound to subject its public officers and their subordinates to pains and penalties criminal and civil in order to have this question settled" (p. 448), it could resort to equity. Neither step in the Court's reasoning is applicable here.

1. There can be no contention that the taxes imposed by Sections 2 (a) and 3 (a) of the Carriers Taxing Act of 1937, c 405, 50 Stat. 435, are penalties rather than taxes.

2. There is full provision for orderly determination of complainant's liability for these taxes by payment, claim for refund and suit for recovery. Section 4 of the Carriers Taxing Act provides that "If more * * * than the correct amount of the tax * * * is paid * * * the amount of the overpayment shall be refunded * * * in such manner * * * as may be prescribed by regulations under this Act * * *." Article 702 (a) of Treasury Regulations 100 provides that "If more than the correct amount of tax * * * is paid to the collector * * * the person paying such tax * * * may file a claim for refund * * *." Article 702 (b) makes specific provision for claims filed by an employer for refund of the employees' tax, requiring either a statement that the employee has been repaid or the written consent of the employee. Section 3226 of the Revised Statutes authorizes suits for the recovery of

any internal revenue tax after the Commissioner has denied a claim for refund or has failed to act within six months. Thus, there is a plain and adequate remedy, through the normal procedure of a claim for refund of taxes paid, which complainant may invoke with respect both to its own taxes and to the employee taxes.²

III

THE ISSUES PRESENTED BY COMPLAINANT HAVE CLEARLY BEEN DECIDED AGAINST IT BY PREVIOUS DECISIONS OF THIS COURT

At pages 46-50 of the brief in response to the rule to show cause it is shown that previous decisions of this Court have completely disposed of all questions presented by the complaint. To the cases there cited may be added *Helvering v. Gerhardt*, 304 U. S. 405, indicating the narrow room for any claim of immunity against federal taxation, and *Allen v. Regents*, 304 U. S. 439, further clarifying the principle that a business enterprise, even though conducted by a State, cannot share the sovereign immunity against taxation.

WHEREFORE, for the reasons set forth herein and in the brief filed in response to the rule to show

² It is, accordingly, unnecessary to consider the questions as to whether complainant has standing to challenge the employee tax (compare *Helvering v. Davis*, 301 U. S. 619, with the *Regents case*) and whether, if no remedy had been provided for the employee tax, all of complainant's questions could not have been settled by a claim for refund of its own tax.

cause, the defendants respectfully submit that their motion to dismiss the bill of complaint should be granted.

ROBERT H. JACKSON,
Solicitor General.

OCTOBER 1938.

ANSWER TO BILL OF COMPLAINT

Come now the defendants in the above-entitled cause, by the Solicitor General, and, without waiving any of their rights and defenses under the motion filed herewith in their behalf to dismiss the bill of complaint, and now and at all times hereafter saving unto themselves all benefits and advantages of objection or exception which can or may be had or taken to the bill of complaint, for answer thereto or to so much and such parts thereof as they are advised it is material or necessary for them to make answer unto, by way of answer respectfully state:

I

The defendants are without knowledge or information sufficient to form a belief concerning any of the allegations contained in Article I of the bill of complaint, except that the defendants admit that the State of California is one of the United States of America.

II

The defendants admit each and every allegation of Article II except the allegations that the defendants Latimer, Dailey, and Eddy are sued

herein individually, and that the defendant Dailey is a member of the Railroad Retirement Board, which allegations defendants deny, and aver that the term of office of the defendant Dailey expired on August 29, 1938.

III

With respect to the allegations contained in Article III of the bill of complaint, defendants aver that the allegations are conclusions of law, which require no answer herein.

IV

The defendants admit that the State Belt Railroad has a physical connection with the Southern Pacific Company; that its tracks run onto forty-five wharves used by the Southern Pacific Company, the Atchison, Topeka, and Santa Fe Railway Company, the Northwestern Pacific Railway Company, and the Western Pacific Railway Company; that its tracks connect with freight yards used by the said companies; that in such freight yards all switching is done by the State Belt Railroad; and that each of the said companies is a common carrier engaged in interstate commerce by railroad.

The defendants aver that the State Belt Railroad connects with, does all the switching in, and hauls all cars entering or leaving, certain freight yards used by the four carriers above-mentioned; that it moves all the carload freight and empty cars between numerous industries, wharves, car ferries, yards, and transfer tracks, consigned to or from

points within or without the State of California or both originating in and consigned to points without the State of California; that all the industries, wharves, car ferries, and freight yards above-mentioned are served exclusively by the State Belt Railroad in the movement of cars; that in performing its services the State Belt Railroad makes no distinction between cars owned by railroads operating within the State and cars owned by railroads operating exclusively without the State; that most of the traffic moved by the State Belt Railroad consists of carload shipments originating outside California and shipped to consignees located along its tracks or originating at points along its tracks and consigned to states other than California; that many cars hauled by complainant both originate in and are consigned to points outside California; that a considerable portion of the traffic handled by complainant either originates in or is consigned to foreign countries; that complainant is a link in the through transportation of interstate freight, is a facility of transportation offering its services as a common carrier of interstate traffic, is operated as an integral part of the national transportation system, is a carrier by railroad subject to Part I of the Interstate Commerce Act, and has been held by the Interstate Commerce Commission to be a carrier by railroad subject to Part I of the Interstate Commerce Act.

With respect to the allegation that the State of California in the construction, maintenance, op-

eration, management, and control of the State Belt Railroad, or in any of such activities, is engaged in a usual, traditional, and essential governmental function, defendants aver that such allegation is a conclusion of law not requiring answer herein.

Except as admitted or as differently alleged hereinabove, the defendants are without knowledge or information sufficient to form a belief concerning any of the other allegations of fact contained in Article IV of the bill of complaint.

V

The defendants aver that the statement in Article V of the bill of complaint that all the powers and duties of the Board of State Harbor Commissioners for San Francisco Harbor are essentially governmental in character and such as are usually and traditionally a part of government functioning is a conclusion of law not requiring answer herein.

The defendants are without knowledge or information sufficient to form a belief concerning any of the other allegations contained in said Article.

VI

The defendants deny that any of the employees of the State Belt Railroad now are members of the State Employees' Retirement System of the State of California, and deny that at any time since the enactment of the Railroad Retirement Act of 1935 any of them have been such members. The defend-

ants aver that it is unnecessary to answer the other allegations of Article VI of the bill of complaint and respectfully refer the Court to the State Employees' Retirement Law, printed as Exhibit D to the bill of complaint, certain provisions of which are summarized in that Article.

VII

The defendants admit that if the Carriers Taxing Act of 1937 is applied to the State Belt Railroad the complainant will be under obligation to pay to the internal revenue officers of the United States approximately \$7,862.32 yearly, as and for an income tax on the employees of said railroad, and an excise tax upon the complainant in the approximate amount of \$7,862.32 yearly. The defendants are without knowledge or information sufficient to form a belief concerning any further allegations of fact contained in the paragraph beginning and ending on Page 19 of the bill of complaint. The defendants aver that the complainant would have a right to deduct the amounts which it would pay to the United States as and for an income tax on the employees of the State Belt Railroad from the wages otherwise due to such employees before the payment of such tax, and that the complainant would deduct such amounts.

The defendants aver that it is unnecessary to answer the other allegations contained in Article VII of the bill of complaint, and respectfully refer

the Court to the Railroad Retirement Act of 1937, the Railroad Retirement Act of 1935, and the Carriers Taxing Act of 1937, which those allegations purport to summarize and to characterize.

The defendants aver that the complainant has reported to the Railroad Retirement Board the service and compensation of not less than 180 employees who have rendered compensated service to the complainant between January 1, 1937, and the date when this suit was begun, and each of whom had acquired legally enforceable rights to benefits under the Railroad Retirement Act, all of which rights are placed in issue in this suit. Each such employee is an indispensable party to the determination of the issues involved herein. The defendants further aver that prior to the commencement of this suit not less than sixteen employees and former employees of the complainant had filed claims for annuities with the Railroad Retirement Board, which claims were based in whole or in part upon the rendition of service to the complainant. The legally enforceable rights of each such claimant under such claim are placed in issue in this suit, and each such claimant is an indispensable party to the determination of the issues involved herein. The defendants further aver that many of the employees and claimants hereinbefore referred to are citizens of the complainant state and that their joinder would oust the jurisdiction of this Court.

VIII

The defendants aver that each of the allegations in Article VIII of the complaint constitutes a conclusion of law which requires no answer herein, except in so far as said Article may be construed to contain an allegation that defendant Helvering has demanded payment of any taxes from complainant, which allegation defendants deny.

IX

The defendants admit that defendants Latimer, Dailey, and Eddy, purporting to act as members of the Railroad Retirement Board, have notified complainant in writing, as shown by Exhibit A, attached to the bill of complaint, that the Railroad Retirement Act of 1935 and the Railroad Retirement Act of 1937 apply to the State Belt Railroad and to the complainant; and aver that such action of defendants Latimer, Dailey, and Eddy was in response to a request of complainant and was taken by them only in their official capacities as members of the Railroad Retirement Board.

The defendants deny that defendants Latimer, Dailey, and Eddy have, or that any defendant has, threatened to require the complainant to gather or keep records of the employees of complainant on the State Belt Railroad. The defendants aver that the term of office of defendant Dailey expired on August 29, 1938, and deny that defendants Latimer and Eddy or either of them will require com-

plainant to gather or to keep such records otherwise than through the exercise of the power to make orders and to bring judicial proceedings for their enforcement pursuant to Section 10 (b) 4 of the Railroad Retirement Act of 1937, and the defendants aver that the exercise of such power can impinge upon complainant only through the operation of normal judicial processes affording adequate opportunity to challenge the correctness of orders so made. The defendants deny that they or any defendant will enforce against the complainant, its officers, agents, or employees, any penalties, if it refuses to gather and keep such records or under any other circumstances. The defendants aver that the duty of enforcement of penalties under the Railroad Retirement Act of 1935 and the Railroad Retirement Act of 1937 is vested by statute in certain persons other than the defendants, to wit, the Attorney General of the United States and the United States attorneys.

X

The defendants admit that defendant Helvering, purporting to act as Commissioner of Internal Revenue, has notified complainant in writing, as shown by Exhibit B attached to the bill of complaint, that the Carriers Taxing Act of 1937 applies to the State Belt Railroad and to the complainant; and aver that such action of defendant Helvering was in response to a request of complainant and was taken by him only in his official capacity as Commissioner of Internal Revenue.

The defendants deny each and every allegation contained in the second and third paragraphs of Article X of the bill of complaint. The defendants aver that there are persons other than the defendants invested by statute with duties and functions which constitute an indispensable part of the operation of the Carriers Taxing Act of 1937, to wit, the Collectors of Internal Revenue, who are charged with the collection of the taxes, and the Attorney General of the United States and the United States attorneys, who are charged with the duty of prosecuting violations of the statute.

XI

The defendants deny that there has been any threatened attempt by defendant Helvering, acting or purporting to act as Commissioner of Internal Revenue, to collect from complainant any taxes imposed by the Carriers Taxing Act of 1937 and aver that the only action taken by defendant Helvering has been as shown by Exhibit B attached to the bill of complaint. Defendants further aver that none of them is charged with the duty of collecting the taxes imposed by the Carriers Taxing Act of 1937, but that the Collector of Internal Revenue for the First District of California is the officer charged with that duty and that the said Collector of Internal Revenue is an indispensable party to the determination of the issues involved herein.

The defendants admit that the Carriers Taxing Act of 1937, if applied to complainant, would im-

pose upon it as an employer an annual excise tax of \$7,862.32. Defendants also admit that complainant could, by paying the said excise tax and by deducting and paying the tax levied upon the income of employees of the State Belt Railroad, avoid any penalties to which complainant or its officers and employees might become subject for refusing to pay the said taxes imposed by the Carriers Taxing Act of 1937. But defendants deny that payment of the said excise tax or deduction and payment of the said income tax would result in irreparable injury to complainant. Defendants aver that complainant has a complete, speedy, and adequate remedy at law in that complainant may pay the said taxes and if it believes them to have been erroneously or illegally exacted or paid may demand of the Commissioner of Internal Revenue that the same be refunded, and if such demand be refused or not passed upon within six months, may, pursuant to statute, bring suit to compel such refund.

The defendants deny the allegation contained in the paragraph beginning on Page 25 of the bill of complaint to the effect that in case complainant should pay the taxes imposed by the Carriers Taxing Act of 1937 and the said Act should later be determined to have no application to it and to its employees, complainant would suffer irreparable loss on account of the multiplicity of claims and suits by the employees of the State Belt Railroad to establish their civil service status under the laws of the State of California and their rights and

privileges under the State Employees' Retirement System. Defendants are without knowledge or information sufficient to form a belief concerning the allegation contained in the paragraph beginning and ending on Page 26 of the bill of complaint to the effect that the amount of the excise tax imposed by the Carriers Taxing Act upon complainant must, if paid, be supplied from charges collected by complainant in the administration of San Francisco Harbor, but defendants deny the allegations of said paragraph to the effect that the charges necessary to supply such amount would be in addition to those now imposed by the Board of State Harbor Commissioners for San Francisco Harbor and to the effect that imposition upon complainant of the excise tax provided for by the Carriers Taxing Act of 1937 would burden commerce in the harbor of San Francisco and would require revision of the tariffs applicable to such commerce. Defendants further deny the allegations of the paragraph beginning and ending on Page 27 of the bill of complaint to the effect that if complainant should deduct or pay over to the United States the tax levied upon the income of its employees, it would be subjected to the harassment and expense of claims and demands and to a multiplicity of suits by its employees to recover the amounts so deducted.

Defendants, for further answer to each of the foregoing allegations referred to in the above paragraph of this answer, aver that under the State Employees' Retirement Law, if complainant is cor-

rect in its assertion that it is not an employer subject to the Railroad Retirement Acts and the Carriers Taxing Act, it is required to pay into the State Employee's Retirement Fund from the San Francisco Harbor improvement fund an amount in excess of the excise tax imposed upon complainant by the Carriers Taxing Act; and is required to deduct from the compensation of the employees of the State Belt Railroad and pay into the State Employees' Retirement Fund an amount in excess of the amount it would be required to deduct from the compensation of such employees and pay to the United States under the Carriers Taxing Act if it is an employer subject to that Act. Defendants aver, therefore, that even if the excise tax levied upon complainant by the Carriers Taxing Act of 1937 must be supplied from charges collected by complainant in the administration of San Francisco harbor, complainant will not be compelled to collect additional charges in order to pay said tax or to revise the tariffs applicable to commerce in said harbor, and that complainant can avoid the several alleged irreparable injuries with respect to the payment of both its excise tax and the tax on the income of its employees by setting aside under the State Employees' Retirement Law the greater amounts required by that law to be set aside, and by paying therefrom the lesser amounts required to be paid to the United States under the Carriers Taxing Act and thereafter pursuing its legal remedy to recover such lesser amounts.

With respect to the allegations contained in the paragraph beginning at the bottom of Page 27 of the bill of complaint to the effect that, under the requirements of the Carriers Taxing Act of 1937 relating to the tax levied upon the income of its employees' complainant would be compelled to set up an account on its books with each of its employees and make deductions and entries, representing the tax, daily, semimonthly, or monthly according to the period "as and when" each employee is paid, defendants aver that they have no knowledge concerning the tenure of complainant's employees, but further aver on information and belief that there is no substantial difference between the records required to be kept by the State Employees' Retirement Law and the records required to be kept by the Carriers Taxing Act, and that complainant could suffer no injury or burden, irreparable or otherwise, by reason of being compelled to keep such records under the Carriers Taxing Act.

The defendants deny that the remedy at law available to complainant will delay for a longer time than the remedy pursued herein the determination of the applicability of the Railroad Retirement Acts and of the Carriers Taxing Act to complainant and to its employees. Defendants aver that the taxes imposed by the Carriers Taxing Act of 1937 for the first three quarters of 1937 became due at approximately the same time that

complainant requested the Commissioner of Internal Revenue to determine the applicability of that Act to the State Belt Railroad; that if complainant had at that time paid the taxes and filed its claim for refund, such claim would, at approximately the time this suit was commenced, have been allowed, disallowed, or not passed upon by the Commissioner of Internal Revenue within six months after such claim was filed; that if disallowed or not passed upon within such period of six months, complainant at that time would have had the right to bring suit for a refund of such taxes; and therefore defendants aver that any delay in the determination of the applicability of the Carriers Taxing Act of 1937 to complainant and its employees has resulted solely from the failure of complainant to pursue its legal remedy expeditiously.

The defendants deny that defendants Latimer, Dailey, and Eddy, or any of them, acting or purporting to act as members of the Railroad Retirement Board, have threatened to require complainant to gather or keep records of its employees on the State Belt Railroad, and aver that the only action of said defendants has been as shown by Exhibit A attached to the bill of complaint. Defendants further aver that the term of office of defendant Dailey expired on August 29, 1938, and that defendants Latimer and Eddy can compel complainant to gather or keep the records required

by the Railroad Retirement Acts only through the exercise of the power to make orders and to bring judicial proceedings for their enforcement pursuant to Section 10 (b) 4 of the Railroad Retirement Act of 1937; and the defendants aver that the exercise of such power can impinge upon complainant only through the operation of normal judicial process affording adequate opportunity to challenge the correctness of the orders. Defendants further aver that they have no power to enforce against complainant, its officers, or employees any penalties for refusal to gather or keep such records as may be required under the Railroad Retirement Acts, and that the duty of enforcing penalties under the said Acts is vested by law in certain persons other than the said defendants, to wit, the Attorney General and the United States attorneys. For further answer to the allegations of the bill in this regard defendants aver that the burden and expense upon complainant of obtaining, keeping, and supplying data to the Railroad Retirement Board under the Railroad Retirement Acts would be negligible in that the reporting of service rendered prior to January 1, 1937, involves simply transcription from records which complainant has long been required to maintain and that the regulations of the Railroad Retirement Board with respect to the reporting of current service and compensation are so designed as to permit ready transcription from payrolls.

The defendants aver that the allegation contained in Article XI to the effect that complainant in the administration of San Francisco harbor is engaged in an essential, usual, and traditional governmental function constitutes a conclusion of law requiring no answer herein. As to the allegations of fact in Article XI not specifically denied hereinabove, defendants deny each and every such allegation except as they have hereinabove admitted, qualified, or realleged such allegations.

The defendants aver that by reason of the foregoing facts complainant has had and now has a speedy and adequate remedy at law for contesting, and for securing a determination of, the applicability to it and to its employees of the Railroad Retirement Acts and of the Carriers Taxing Act and that, therefore, this cause is not cognizable in equity.

WHEREFORE, having fully answered the bill of complaint herein, defendants jointly and severally pray that the bill of complaint be dismissed, and that they recover against complainant their costs herein expended.

ROBERT H. JACKSON,
Solicitor General.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. —, ORIGINAL

THE STATE OF CALIFORNIA, COMPLAINANT

v.

MURRAY W. LATIMER, JAMES A. DAILEY, AND LEE M. EDDY, INDIVIDUALLY AND AS MEMBERS OF THE RAILROAD RETIREMENT BOARD, AND GUY T. HELVERING, INDIVIDUALLY AND AS COMMISSIONER OF INTERNAL REVENUE, DEFENDANTS

ON RULE TO SHOW CAUSE WHY LEAVE TO FILE THE BILL OF COMPLAINT SHOULD NOT BE GRANTED

RESPONSE TO THE RULE TO SHOW CAUSE

Now come the defendants above-named, by the Solicitor General, and for their response to the rule to show cause issued by this Court on April 11, 1938, say that the motion for leave to file the bill should not be granted, for the following reasons:

1. The Collector of Internal Revenue for the First District of California and the employees of the State Belt Railroad have not been joined as defendants. They are indispensable parties in whose absence the Court should not proceed.

2. The cause is not maintainable in this Court, since the Collector of Internal Revenue for the First District of California, a citizen of California, should be made a party, and to join him would deprive the Court of original jurisdiction.

3. The cause is not maintainable in this Court, since the employees of the State Belt Railroad, citizens of California, should be made parties, and to join any of them would deprive this Court of original jurisdiction.

4. The proposed bill of complaint is without equity because it appears from the allegations thereof that the complainant will suffer no injury, irreparable or even substantial, from any action taken or threatened by the defendants.

5. Complainant has an adequate and complete legal remedy through the payment of the questioned taxes which have accrued under the Carriers Taxing Act of 1937, followed by a suit for a refund.

6. Maintenance of the suit is prohibited by Section 3224 of the Revised Statutes.

7. The United States is the real party in interest and hence an indispensable party. It may not be sued without its consent and has not consented to this suit.

8. The issues presented by complainant have been clearly decided against it by previous decisions of this Court, and a re-examination of those contentions would serve no useful purpose.

And in support of this response, the defendants ask leave to file the brief hereto attached.

Wherefore, the defendants pray that the motion for leave to file the proposed bill be denied and the rule discharged.

ROBERT H. JACKSON,
Solicitor General.

APRIL 1938.

**BRIEF ON BEHALF OF THE DEFENDANTS, IN SUPPORT
OF THEIR RESPONSE TO THE RULE**

JURISDICTION

The motion was submitted April 4, 1938. The rule to show cause issued April 11, 1938, returnable on or before April 25, 1938.

Jurisdiction is asserted under the Constitution of the United States, Article III, Section 2, Clause 2. The existence of jurisdiction is disputed.

QUESTIONS PRESENTED

1. Whether the Collector of Internal Revenue for the First District of California and the employees of the State Belt Railroad are indispensable parties in whose absence the Court should not proceed.

2. Whether to join the Collector of Internal Revenue for the First District of California, a California citizen, would deprive this Court of original jurisdiction.

3. Whether to join the employees of the State Belt Railroad, some of whom are citizens of California, would deprive this Court of original jurisdiction.

4. Whether the bill of complaint alleges facts to show that the complainant will suffer irreparable injury from any action taken or threatened by the defendants.

5. Whether complainant has an adequate legal remedy through the payment of the taxes accrued under the Carriers Taxing Act of 1937, followed by a suit for refund.

6. Whether this suit is prohibited by Section 3224 of the Revised Statutes.

7. Whether the United States is an indispensable party which cannot be joined because it has not consented to be sued.

8. Whether this Court should deny leave to file the bill of complaint for the reason that all of the issues which it presents have been decided adversely to the complainant by previous decisions of this Court.

STATUTES AND OTHER AUTHORITIES INVOLVED

The pertinent section of the Constitution and the statutes involved are set forth in the Appendix.

STATEMENT

This is a motion by the State of California for leave to file an original bill of complaint.

The defendants, who are sued both individually and in their respective official capacities, are the Chairman of the Railroad Retirement Board, who is alleged to be a citizen of the State of New York; the other two members of the Railroad Retirement Board, one of whom is alleged to be a citizen of the State of New York and the other of whom is alleged to be a citizen of the State of Missouri; and the Commissioner of Internal Revenue, who is alleged to be a citizen of the State of Kansas (Bill, p. 9).

Complainant owns and operates the line of railroad, known as the State Belt Railroad, along the San Francisco waterfront. The proposed bill seeks to enjoin the enforcement against complainant of the Carriers Taxing Act of 1937, the Railroad Retirement Act of 1937, and the Railroad Retirement Act of 1935. It further seeks to enjoin the members of the Railroad Retirement Board from certifying for payment or authorizing the payment of any annuity, benefit, or award accruing under the Railroad Retirement Acts to or with respect to any employee of complainant (Bill, pp. 29 to 32). The ground for this relief is the alleged inapplicability of the three Acts in question to the State Belt Railroad. It is not entirely clear whether complainant is raising solely the question of statutory construction or whether it likewise raises the question of the constitutionality of these Acts, if held applicable to it. The bill, however, does allege that taxes under the Carriers Taxing Act of 1937 "cannot be imposed upon complainant, State of California, or upon the State Belt Railroad without violating the fundamental implied constitutional doctrine of the reciprocal immunity from taxation of the governmental functions, agencies and instrumentalities of the states and the United States respectively" (Bill, p. 20).

The three Acts in question are printed in full in the Appendix.

In general, the Carriers Taxing Act of 1937 imposes an excise tax on carriers by railroad subject

to Part I of the Interstate Commerce Act, and an income tax upon the employees of such carriers. In general, the Railroad Retirement Act of 1937 and the Railroad Retirement Act of 1935 provide for the payment by the United States of annuities and other benefits to or with respect to employees of carriers subject to Part I of the Interstate Commerce Act who meet the requirements of the said Acts for such payments. These requirements in general deal with age, service in the employ of an "employer" as defined in the Acts, and relinquishment of rights to be in the service of such an employer and of the person by whom he was last employed. The amount of the payments is based upon the years of service of the individual in the employ of an "employer" and the compensation earned during such period.

The following allegations are contained in the bill which complainant seeks to file:

The complainant for about forty-five years has operated, without any profit and for the purpose of facilitating the commerce of the port of San Francisco, the State Belt Railroad, which is located upon real property owned by complainant on the waterfront of the City and County of San Francisco. The railroad has a physical connection with the tracks of the Southern Pacific Company and also runs onto forty-five wharves owned by the State of California and used by freight car ferries of four common carriers engaged in interstate commerce

by railroad. The State Belt Railroad also connects with certain freight yards owned by the State of California and used by the four carriers. In addition, it has connections with and serves about one hundred seventy-five industries located on its line, and has trackage rights over certain tracks of the Southern Pacific Company for the purpose of interchanging cars. The State of California owns no cars. None of the tracks of the State Belt Railroad is used by any other carrier except for interchanging cars, and no locomotives except those of the State Belt Railroad move over any part of such tracks (Bill, pp. 10-15).

The State Belt Railroad has been administered through the Board of State Harbor Commissioners for San Francisco Harbor, who appoint and supervise superintendents to operate the Railroad. All persons employed in the operation of the State Belt Railroad are appointed under the California Civil Service Act and are officers and employees of the State (Bill, pp. 12-13).

The employees of the State Belt Railroad are members of the State Employees' Retirement System of the State of California, which has as its members the officers and employees of the State. It provides a pension system for State employees, for monthly deductions at specified rates from the compensation of the members of the system, and for the payment of such deductions into the "State Employees' Retirement Fund." Into this fund

the State contributes 3.75 per centum of the compensation of members of the system who are paid from certain State funds, including the San Francisco Harbor improvement fund (Bill, pp. 15-16).

Sections 29 and 38b of the State Employees' Retirement Act provide that persons who are members of any retirement system or pension system supported wholly or in part by funds of the United States Government and who are receiving credit in such other system for service, shall not be members of the State Retirement System of California (Bill, p. 16).

The bill alleges that the Railroad Retirement Act of 1935, the Railroad Retirement Act of 1937, and the Carriers Taxing Act of 1937 constitute a single legislative enactment, having for its sole purpose the establishment of a pension system making provision for annuities, disability, and death benefits to the members thereof (Bill, p. 20). The bill alleges that the defendant members of the Railroad Retirement Board have notified the complainant in writing of their decision that the Railroad Retirement Acts apply to the State Belt Railroad (Bill, p. 21), and that the defendant Commissioner of Internal Revenue has notified the complainant in writing that the Carriers Taxing Act of 1937 applies to that railroad (Bill, p. 22).

The right to equitable relief is predicated upon the following allegations: The members of the Railroad Retirement Board have threatened to re-

quire the complainant to gather and keep records of the employees of the State Belt Railroad, to do which would "put complainant to great expense," and to enforce "certain penalties" against the complainant, if it refuses to gather and keep such records (Bill, pp. 21, 22, and 27). The Commissioner of Internal Revenue has threatened to and will enforce the collection of taxes accrued under the Carriers Taxing Act of 1937 and will subject complainant and its agents to heavy fines and penalties if it fails to pay the same (Bill, pp. 22-24). The bill recognizes that these penalties may be avoided by paying the taxes (which amount, in the case of the complainant, to \$7,862.32 per year) followed by a suit for refund (Bill, p. 24). The bill alleges that this legal remedy is inadequate by reason of the delay involved, the multiplicity of suits for refund which complainant would be required to institute, the multiplicity of claims and demands from its employees with which it would be faced in the interim, and the difficulties which it would encounter in raising the funds necessary to pay tax accruals (Bill, pp. 24 to 28).

SUMMARY OF ARGUMENT

I

This Court, sitting as a court of equity, should decline to assume jurisdiction, since neither the Collector of Internal Revenue nor any of the employees of the State Belt Railroad have been joined as parties.

A. The bill of complaint asks for an injunction against the collection of taxes imposed by the Carriers Taxing Act of 1937. However, it is the Collector of Internal Revenue, and not the Commissioner of Internal Revenue, who is charged by law with the duty of collecting these as well as all other internal revenue taxes. Nor is the Collector a mere subordinate of the Commissioner. He is appointed by the President and derives his authority from Congress. Accordingly the Collector is an indispensable party to any suit seeking an injunction against the collection of the taxes here in question.

B. The employees of the State Belt Railroad are also indispensable parties, since complainant seeks an adjudication that they are not entitled to any of the benefits of the Railroad Retirement Acts, as well as a decree restraining the Railroad Retirement Board from making such benefits available. While such a decree would not technically be *res judicata* against them, it would effectively preclude them from successfully asserting any rights under those Acts. Under like circumstances, this Court has declined to assume original jurisdiction at the instance of a state where to do so would substantially affect the interests of persons not before the Court. The rights of the absent parties will not be protected by the presence of the State, since their interests may be antagonistic to the rights asserted by the State.

The request for leave to file the bill of complaint should be denied, since the cause is not within the original jurisdiction of this Court. Such jurisdiction does not extend to suits by a State against its own citizens or to suits to which its citizens are indispensable parties defendant. *California v. Southern Pacific Co.*, 157 U. S. 229, 262.

Accordingly, since the Collector of Internal Revenue for the First District of California is an indispensable party, and since he is presumably a resident of California (the statutory qualifications for the office of Collector require that each be a resident of his district), the complainant has failed to exhibit a bill falling within the original jurisdiction of this Court. Original jurisdiction is similarly lacking because some of the employees of the State Belt Railroad may also be presumed to be citizens of California.

III

No basis for equitable relief is shown in the proposed bill.

A. No action has been taken or proposed to be taken by any of the three members of the Railroad Retirement Board which in any way threatens irreparable injury to complainant. The supposed injury is said to arise from a threat of these defendants to require complainant to keep certain records of the employees of the railroad and to

enforce "certain penalties" if it refuses to keep such records. Those general allegations, made without supporting facts, presumably have reference to Section 10 (b) (4) of the Railroad Retirement Act of 1937. But that provision merely authorizes the Board to require the maintenance of records, etc. Not only is there no allegation that Board has issued any order under this section, but such an order, even when issued, cannot operate as a threat of irreparable injury. Although the Board may institute a proceeding in the District Court to enforce such an order, complainant would then have an adequate remedy by setting up the alleged illegality of the order as a defense in that proceeding.

To the extent that complainant desires protection against the imposition of any penalties provided for in Section 13 of the Railroad Retirement Act of 1937, it is clear that such relief can be obtained, if at all, only against the United States Attorney. Neither the Board nor its members are authorized to bring criminal proceedings. Moreover, even a threat of criminal prosecution made by the appropriate officer is not sufficient to confer equity jurisdiction, in the absence of threats of a multiplicity of prosecutions. *Spielman Motor Co. v. Dodge*, 295 U. S. 95. Finally, it is clear that the burden of gathering and maintaining such records is so insubstantial that a court of equity should not intervene to relieve the complainant of that burden.

B. Nor is any action threatened by the defendant Commissioner of Internal Revenue which requires equitable relief. The gist of the complaint is that this defendant will collect an allegedly invalid tax and that there is no adequate remedy at law. That position is without foundation on both grounds. Not only is the Commissioner without statutory authority to collect (see Point I A, *supra*), but there is a plain remedy at law in a suit for refund. There are no special circumstances in this case to remove it from the general doctrine that a suit to enjoin the collection of a tax will not lie, if the taxpayer may upon payment bring suit at law for its recovery.

IV

Section 3224 of the Revised Statutes prohibits the maintenance of this suit. It is fully applicable to forbid even those suits in which it is alleged that the tax sought to be enjoined is unconstitutional. *Bailey v. George*, 259 U. S. 16. This complaint does not set forth any exceptional and extraordinary circumstances which could be thought sufficient to avoid Section 3224. And since that section is not only a regulation of jurisdiction but is also a substantive rule of equity practice, it is fully applicable to original proceedings in this Court.

V

The allegations of the bill make it clear that the four individuals who are the nominal defendants

in this suit are sued only because they are officials of the United States. They have no individual interest in the enforcement of these statutes. Therefore, the United States itself is the real party defendant in this cause. Since it may not be sued without its consent, this action may not be maintained.

VI

Finally, the issues presented by complainant have been so clearly decided against it by previous decisions that it should not be permitted to file this bill. That the Railroad Retirement Acts and the Carriers' Taxing Act are applicable to complainant is made plain by *United States v. California*, 297 U. S. 175, 186. And it is equally clear that the State is not entitled to any constitutional immunity from taxation with respect to the State Belt Railroad. *United States v. California, supra*; *Board of Trustees v. United States*, 289 U. S. 48; *Helvering v. Powers*, 293 U. S. 214.

ARGUMENT

I

THE COLLECTOR OF INTERNAL REVENUE AND THE EMPLOYEES OF THE STATE BELT RAILROAD ARE INDISPENSABLE PARTIES TO THIS PROCEEDING

A. The Collector of Internal Revenue is an Indispensable Party

The bill of complaint alleges (p. 22) that the Commissioner of Internal Revenue has threatened

to, and unless enjoined will enforce the collection of taxes, and penalties for non-payment thereof, from the complainant pursuant to the Carriers Taxing Act of 1937. The bill prays (p. 31) that the Commissioner be enjoined from collecting or attempting to collect such taxes.

It clearly appears, however, from the Carriers Taxing Act itself and from other pertinent statutory provisions that the Commissioner of Internal Revenue has neither the power nor the authority to perform the acts complained of. It further appears from the regulations issued by the Commissioner of Internal Revenue, pursuant to that Act, that he has not asserted any such power or authority. The plain fact is that the duty of collecting taxes under the Carriers Taxing Act of 1937 has been lodged by the Congress, not with the Commissioner of Internal Revenue, but with the Collectors of Internal Revenue acting in their several districts.

The Collectors of Internal Revenue are specifically charged by law with the collection of *all* internal revenue. It is provided that—

It shall be the duty of the collectors, or their deputies, in their respective districts, and they are authorized, to collect all the taxes imposed by law, *however the same may be designated* (R. S., Sec. 3183, U. S. C., Title 26, Sec. 1541). [Italics ours.]

Penalties and interest are also to be collected by the Collector. (See R. S., Sec. 3185, U. S. C., Title 26, Sec. 1430 (c)-(e); R. S., Sec. 3176, U. S. C.,

Title 26, Sec. 1512 (d)-(e); R. S., Sec. 3213, U. S. C., Title 26, Sec. 1645 (a).) These statutory provisions clearly authorize the Collector of Internal Revenue to collect the taxes and penalties here in question to the exclusion of the Commissioner.

There is nothing in the Carriers Taxing Act of 1937 which qualifies these express statutory provisions, applicable generally to all taxes. Section 7 (a) of that Act declares that the taxes imposed "shall be collected by the Bureau of Internal Revenue." It is apparent that Congress did not intend by this provision to render inapplicable the general statutory provisions above referred to. It was merely making available to revenue accruing under that Act the usual administrative machinery for the collection of internal revenue taxes, including that portion of such machinery which authorizes the Collectors of Internal Revenue to make the actual tax collections. Nor do the provisions of Section 7 (b) of the Act, which authorize the Commissioner to prescribe regulations affecting the collection of taxes due thereunder, impose any duty or confer authority upon him to make collections. Similar provisions are applicable to Federal taxes generally. Accordingly, while the Commissioner may promulgate regulations, the actual collections must be made by the Collector.

Any possible doubt as to the authority of the Collector, to the exclusion of the Commissioner, to collect the questioned taxes is dispelled by Section

7 (c) of the Carriers Taxing Act. That section incorporates by reference the provisions of Section 602 of the Revenue Act of 1926, c. 27, 44 Stat. 9, which reads:

Every person liable for any tax * * * shall make * * * returns under oath * * * and pay the taxes * * * to the collector for the district in which is located the principal place of business. Such returns shall contain such information and be made at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulations prescribe.

The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. * * * [Italics ours.]

Not only do the foregoing statutory provisions expressly charge the Collectors of Internal Revenue with the duty of collecting taxes, but the Commissioner does not now have no. has he ever had administrative machinery for performing that function. Accordingly, he has not only made no threat to collect taxes or penalties from the complainant here, but by his regulations has specifically recognized that taxes accruing under the Carriers Taxing Act of 1937 are payable to the several Collectors of Internal Revenue (Articles 505 and 506 of Regulations 100).

Nor can it be said that the Collector of Internal Revenue is a subordinate official exercising an au-

thority delegated to him by the Commissioner of Internal Revenue and hence that the latter is the proper officer to be sued. It is true that the Collector is, in a sense, an official in the Bureau of Internal Revenue of which the Commissioner is the chief officer. Yet he does not derive his authority to collect taxes from the Commissioner for, as we have seen, that authority flows directly from Congress itself. Nor does he owe his appointment to the Commissioner. He is appointed by the President with the advice and consent of the Senate (R. S., Sec. 3142, U. S. C., Title 26, Sec. 1731 (a)). Not only is he required by statute to collect taxes but the general duty to enforce internal revenue laws in his district devolves upon him by virtue of congressional mandate (R. S., Sec. 3163, U. S. C., Title 26, Sec. 1544 (a)). He is accountable for all monies collected by his deputies, and is responsible for every act done or neglected to be done by them in their official capacity (Act of February 8, 1875, c. 36, 18 Stat. 307, Sec. 12, as amended; U. S. C., Title 26, Sec. 1544 (b)). He is directed to make the tax return of a taxpayer who fails to make his own return or who makes a false or fraudulent return (R. S., Sec. 3176, U. S. C., Title 26, Secs. 1512, 1524). Further, he may sue on behalf of the Government and be sued as an officer of the Government without in either case joining the Commissioner as a party. Cf. *Moore Ice Cream Co. v. Rose*, 289 U. S. 373.

The Collector^o is thus very differently situated from the subordinate officers sued in *Gnerich v. Rutter*, 265 U. S. 388, and *Webster v. Fall*, 266 U. S. 507, where this Court held that the suits could not proceed in the absence of the superior officers. In those cases the defendant subordinates derived their sole authority from their superiors who were charged by law to perform the acts in question and had delegated those duties to their subordinates. In the present case, however, the tax collecting power of the Collector stems directly from Congress and not from the Commissioner of Internal Revenue.

We accordingly submit that since the Collector of Internal Revenue for the First District of California¹ has exclusive power and authority to collect the taxes and penalties here sought to be enjoined he is, therefore, an indispensable party to the proceeding. Leave to file the bill of complaint should therefore be denied. As was said in *Appalachian Electric Power Co. v. Smith*, 67 F. (2d) 451, 455^o (C. C. A. 4th), certiorari denied, 291 U. S. 674:

Suit will not be entertained to enjoin the enforcement of an unconstitutional act or

¹ San Francisco is included in the collection district designated the First District of California. See publication of the United States Treasury Department (Bureau of Internal Revenue), entitled "Internal Revenue Collection Districts (corrected to April 1, 1938)." Collection districts were presumably established by the President in accordance with R. S., Sec. 3141, U. S. C., Title 26, Sec. 1540.

order when not brought against the official charged with its enforcement.

B. The Employees of The State Belt Railroad are Indispensable Parties

The bill of complaint seeks an adjudication that the Railroad Retirement Acts of 1935 and 1937 do not authorize any awards, payments, or annuities to employees of the State Belt Railroad and seeks to enjoin the Railroad Retirement Board from making or certifying any award or payment to such employees or from supplying the Treasury Department with any information for the purpose of making annuity or other payments to such employees (Bill, p. 29-31).

In substance, therefore, the complainant is seeking an adjudication by this Court that its employees are not entitled to any of the benefits of the Railroad Retirement Acts and an injunction which would restrain the Railroad Retirement Board from making such benefits available. Such an adjudication and decree are sought in a proceeding to which none of complainant's employees are parties and in which no opportunity is given them to assert their rights and interests. It is true that a decree in this proceeding would not technically be *res judicata* against the employees of the State Belt Railroad. However, realistically the effect of a decree by this court granting complainant the relief which it prays will be to adjudicate the rights

of its employees and to preclude them thereafter from successfully asserting their right to participate in the benefits of the Railroad Retirement Acts.

Such an adjudication, made in the absence of the employees affected would render nugatory the right expressly granted them by Section 11 of the Railroad Retirement Act of 1937 to bring suit in the District Court to compel the Board to set aside any action or decision claimed to be in violation of the legal rights of an employee or to take action or make a decision necessary for the enforcement of his legal rights.

It is submitted that under these circumstances this Court will not proceed to adjudicate the issues in the absence of the employees themselves who would be directly and immediately affected by such an adjudication.

In analogous cases this Court has refused to assume original jurisdiction at the suit of a state where the interests of persons not before the court would be substantially affected by its decision. *California v. Southern Pacific Co.*, 157 U. S. 229; *Minnesota v. Northern Securities Co.*, 184 U. S. 199; *New Mexico v. Lane*, 243 U. S. 52; *Texas v. Interstate Commerce Commission*, 258 U. S. 158. See also *Barney v. Baltimore*, 6 Wall. 280; *New Orleans Water Works Co. v. New Orleans*, 164 U. S. 471.

In *Texas v. Interstate Commerce Commission*, *supra*, the State of Texas filed an original bill seeking an adjudication that Titles III and IV of the Transportation Act of 1920 (41 Stat. 456, 469, 474, c. 91) were unconstitutional, the annulment of action theretofore taken thereunder, and an injunction against further action, all with respect to carriers operating in the State of Texas. The sole defendants were the Interstate Commerce Commission and the Railroad Labor Board. The Court declined to entertain the proceeding upon the ground that the Texas carriers and their employees would be so affected by the decree that their presence was indispensable. In dismissing the bill of complaint this court stated (p. 163):

To take up and solve the controversy without their presence and without their being represented would be quite inadmissible, considering the exceptional nature of our original jurisdiction. *California v. Southern Pacific Co.*, 157 U. S. 229, 257; *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 245.

The presence of the State as a complainant does not protect the rights of the absent parties since the interest of the state may be antagonistic to that of the parties not represented in the proceeding, and the state cannot claim to represent both sides of a controversy. *Minnesota v. Northern Securities Co.*, *supra*; *Texas v. Interstate Commerce Commission*, *supra*.

We, therefore, submit that the interests of the employees of the State Belt Railroad in the subject matter of this proceeding and in any decree which this Court might make are so immediate and direct that they, as well as the Collector of Internal Revenue, are indispensable parties in whose absence the Court should not proceed.

II

THE COLLECTOR OF INTERNAL REVENUE AND AT LEAST SOME OF THE EMPLOYEES OF THE STATE BELT RAILROAD ARE PRESUMABLY CITIZENS OF CALIFORNIA. TO JOIN THEM AS PARTIES DEFENDANT WOULD DEPRIVE THE COURT OF JURISDICTION

We have shown under Point I that the Collector of Internal Revenue for the First District of California and the employees of the State Belt Railroad are indispensable parties to this proceeding. Under established rules of practice this deficiency of indispensable parties means that the suit may not be maintained. In this section we shall show that this defect of parties also operates to oust this Court of jurisdiction.

The statute providing the qualifications for the office of Collector requires that each be a resident of his district (R. S., Sec. 3142, U. S. C., Title 26, Sec. 1731 (a)). It will be presumed that this requirement was met in the appointment of the Collector for the First District of California and that he is a citizen of that State. In the absence of any

allegation to the contrary, it may also be presumed that at least some of the employees of the State Belt Railroad are citizens of California. Cf. *New Mexico v. Lane*, 243 U. S. 52.

To join these California citizens as parties defendant would defeat the jurisdiction of this court. The court's original jurisdiction depends wholly upon the character of the parties, and in the instant proceeding is predicated upon the fact that the State of California is the complainant. But it is well settled that such original jurisdiction does not embrace suits by a state against its own citizens. *Cohens v. Virginia*, 6 Wheat. 264, 393-394; *Pennsylvania v. Quicksilver Company*, 10 Wall. 553; *California v. Southern Pacific Co.*, 157 U. S. 229, 257-258, 261.

Where it appears that indispensable parties defendant are absent, it is the usual practice to permit the complainant to amend in order to bring them in. Where, however, it is apparent that the presence of such parties would defeat the original jurisdiction of this court, the bill of complaint will be dismissed. *California v. Southern Pacific Co.*, 157 U. S. 229, 257-262; *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 246-247; *New Mexico v. Lane*, *supra*, 52, 58; *Texas v. Interstate Commerce Commission*, 258 U. S. 158, 163-164.

In *California v. Southern Pacific Co.*, *supra*, the State of California attempted to invoke the original jurisdiction of this court in a suit against a Kentucky corporation. Upon an examination of

the bill of complaint, the Court found that the City of Oakland, California, and the Oakland Water Front Company, a California corporation, had interests in the subject matter of the litigation which would substantially be affected by an adjudication against the Kentucky corporation. It concluded that although these California citizens would not technically be bound by the decree, their interest was such as to make them indispensable parties. It, therefore, dismissed the bill saying (p. 262) :

We are of opinion that our original jurisdiction cannot be thus extended, and that the bill must be dismissed for want of the parties who should be joined, but cannot be without ousting the jurisdiction.

Accordingly, we submit that leave to file the bill of complaint must be denied since citizens of California are indispensable parties to the proceeding and to bring them in would deprive this Court of jurisdiction.

III

THE BILL OF COMPLAINT IS WITHOUT EQUITY BECAUSE ITS ALLEGATIONS SHOW THAT THE COMPLAINANT WILL SUFFER NO INJURY, IRREPARABLE OR EVEN SUBSTANTIAL, FROM ANY ACTION TAKEN OR THREATENED BY THE DEFENDANTS. COMPLAINANT HAS AN ADEQUATE AND COMPLETE LEGAL REMEDY THROUGH PAYMENT OF THE TAXES FOLLOWED BY A SUIT FOR REFUND

The only actions alleged by the bill to have been taken by any of the defendants with reference to

the complainant are the letters from the General Counsel of the Railroad Retirement Board and from the Commissioner of Internal Revenue (Bill, pp. 34 and 37) written in response to an inquiry of the complainant, announcing the decision of the Board and of the Commissioner that the Railroad Retirement Acts of 1935 and 1937 and the Carriers Taxing Act of 1937 are applicable to the State Belt Railroad. Neither of these letters contains any threat of action against the complainant, and it is clear that the determinations made by the Board and the Commissioner do not of themselves constitute any injury to it. This fact is apparently recognized in the bill of complaint which further alleges certain threatened conduct on the part of the defendants as the basis for the exercise of equity jurisdiction by this Court.

The supposed irreparable injury is said to arise as follows: (1) The members of the Railroad Retirement Board have threatened to require the complainant to gather and keep records of the employees of the railroad which would "put complainant to great expense" and to enforce "certain penalties" against the complainant if it refuses to gather and keep such records (Bill, pp. 21, 22, and 28). (2) The Commissioner is threatening to collect taxes accrued under the Act in the annual sum of \$7,862.32, and complainant will be exposed to fines, penalties, and imprisonment for willful failure to pay such taxes, deduct an equal sum from the

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compensation of its employees, or keep the records and supply the information required. These penalties, complainant admits, can be avoided by payment of the taxes followed by a suit for refund, but it alleges that that remedy is inadequate (Bill, pp. 23-27).

It is submitted that, upon analysis, it will appear that neither of the foregoing assertions constitutes any substantial basis in fact or law for a claim of irreparable injury or that the complainant's legal remedy through payment of the taxes and a suit for a refund is not entirely adequate. It results that there is no basis in the bill of complaint for the jurisdiction of a court of equity.

A. Complainant is not Exposed to Any Injury, Irreparable or Otherwise, from Any Threatened Action by the Members of the Railroad Retirement Board

Complainant's general allegation, made without supporting facts, that the defendant members of the Railroad Retirement Board have threatened to and, unless enjoined, will require the complainant to gather and keep records of the employees of the State Belt Railroad can refer only to the exercise by the Board of the authority conferred upon it by Section 10 (b) 4 of the Railroad Retirement Act of 1937:

- The Board shall have power to require all employers and employees and any officer, board, commission, or other agency of the

United States to furnish such information and records as shall be necessary for the administration of such Acts.

It is not alleged that the Board has issued any order under this section. It is clear that an order, when issued, will constitute no threat of irreparable injury calling for the exercise of equity jurisdiction.

Section 10 (b) 4 further provides that orders of this character, like other orders of the Board, may be enforced by it by means of a proceeding instituted in the District Court. If the Board elects to pursue this means to compel obedience to its order, it is clear that complainant will have an entirely adequate remedy by asserting the alleged illegality of the order as a defense in the enforcement proceedings.

Complainant also alleges, however, that if it fails to gather and keep records of its railroad employees, the defendant members of the Railroad Retirement Board will enforce against it, its officers, agents, and employees, "certain penalties" (Bill, p. 22). Presumably the penalties to which the complainant refers are those imposed by Section 13 of the Railroad Retirement Act of 1937 which provides:

Any officer or agent of an employer, as the word "employer" is hereinabove defined, or any employee acting in his own behalf, or any individual whether or not of the char-

acter hereinbefore defined, who shall willfully fail or refuse to make any report or furnish any information required, in accordance with the provisions of Section 10 (b) 4, by the Board in the administration of this Act or the Railroad Retirement Act of 1935

* * * shall be punished by a fine of not more than \$10,000 or by imprisonment not exceeding one year.

Complainant's allegation, therefore, amounts to nothing more than the existence of a possibility that it, its officers, agents or employees may, at some future date, be prosecuted under the provisions of this section. Such an allegation falls far short of the requirements for equity jurisdiction for the following reasons:

1. The Board is not authorized to prosecute criminal proceedings under Section 10 (b) 4 of the Act. That duty rests with the United States Attorney for the Northern District of California who has not been made a party to this proceeding and who cannot be joined without depriving this court of jurisdiction. (See Point II, *supra*.) Since the power to prosecute does not lie with the members of the Railroad Retirement Board, there is no conduct of theirs which the court may enjoin. Compare *Federal Trade Commission v. Claire Furnace Company*, 274 U. S. 160.

2. The penalties prescribed by Section 10 (b) 4 are imposed only for the *willful* failure or refusal

to make the required reports or furnish the required information. Under a closely analogous statute this court has held that a refusal made in good faith and based upon an actual belief (even if unfounded) in the illegality of the demand may not be willful. *United States v. Murdock*, 290 U. S. 389. In any case, the decision whether complainant's refusal to furnish the required report or information is willful rests, in the first instance, in the discretion of the United States Attorney. At least until that discretion has been exercised there is no foundation for the interposition of a court of equity. *Federal Trade Commission v. Claire Furnace Company*, 274 U. S. 160; *Ex parte La Prade*, 289 U. S. 444.

3. If the Railroad Retirement Board does require the complainant to furnish information and records, if the complainant refuses to comply and if thereafter the United States Attorney determines to prosecute, complainant may raise every defense asserted in its bill upon the trial of the criminal case. The courts are without equity jurisdiction to enjoin criminal prosecutions (even under unconstitutional statutes) where, as here, the criminal penalty is not cumulative, there is no threat of a multiplicity of prosecutions, and all of the grounds urged for an injunction may be raised as defenses in the criminal proceeding. *Spielman Motor Co. v. Dodge*, 295 U. S. 95.

It is, therefore, apparent that the consequences of the failure or refusal of complainant to keep and maintain records in response to any requirement that the Board may hereafter make are not such as to entitle it to an injunction. It is further true that the burden of gathering and keeping such records and furnishing such reports and information is so insubstantial that a court of equity would in no event relieve the complainant from performing it. Complainant alleges generally that it will be put "to great expense" in obtaining, keeping, and supplying the necessary data. Beyond this there is no allegation of the cost of this effort. The fact is that such cost would be negligible. The regulations of the Railroad Retirement Board with respect to the reporting of current service and compensation are so designed as to permit ready transcription from pay rolls. (Regulations Governing the Preparation of Employer's Reports of Monthly Compensation of Employees and Registration of Employees Subject to the Railroad Retirement Act, Federal Register, Volume 3, p. 22, Sections 4, 6; Cf. State Employees' Retirement Act, Section 67.) Reports of past service and compensation are available and involve simple transcription from records which complainant has long been required to maintain. The State Belt Railroad is a common carrier by railroad, subject to the Interstate Commerce Act (*California Canneries Co. v. Southern Pacific Co.*, 51 I. C. C. 500). As such, it

has long been subject to detailed supervision with respect to the maintenance and preservation of accounts and records.²

We, therefore, submit that the allegations of the bill of complaint with reference to action threatened by the members of the Railroad Retirement Board establish no basis for equity jurisdiction both because the complainant would suffer no irreparable injury from refusing to comply with the requirements which it is alleged the Board is threatening to make and because compliance with such requirements would result in no substantial injury.

B. The Alleged Threat of the Commissioner of Internal Revenue to Collect Taxes From the Complainant Exposes It to no Irreparable Injury. Complainant Has an Adequate Legal Remedy Through Payment of the Taxes and a Suit for Refund

The bill of complaint alleges that the Commissioner of Internal Revenue has threatened to col-

² Interstate Commerce Act, Section 20; Act of Feb. 4, 1887, c. 104, Sec. 20, 24 Stat. 386, as amended June 29, 1906, c. 3591, Sec. 7, 34 Stat. 593; June 18, 1910, c. 309, Sec. 14, 36 Stat. 555; Mar. 4, 1915, c. 176, Sec. 1, 38 Stat. 1196; Aug. 9, 1916, c. 301, 39 Stat. 441; and Feb. 28, 1920, c. 91, Secs. 434-438, 41 Stat. 493, 494; Rules for Reporting Information on Railroad Employees. United States Railroad Labor Board and Interstate Commerce Commission, April 18, 1921; Regulations to Govern the Destruction of Records of Steam Roads, Interstate Commerce Commission, July 1, 1914. The regulations last cited were amended in 1935 to require the permanent preservation of pay rolls (Amendment of August 1, 1935).

lect taxes accrued under the Carriers Taxing Act of 1937 from the complainant and that if it fails to pay such taxes it and its agents will be exposed to criminal prosecution, fines, and penalties. We have already pointed out that the power to collect these taxes is vested in the Collector of Internal Revenue for the First District of California to the exclusion of the Commissioner and that the Commissioner has recognized this fact. (See Point I A, supra.) Beyond that, it is clear that complainant can avoid any penalties imposed for non-payment by paying the tax and suing for a refund. This Court has long held that a court of equity is without jurisdiction to enjoin the collection of a tax in the absence of special circumstances from which it would appear that payment and suit for a refund would irreparably injure the taxpayer. Cf. *Dows v. Chicago*, 11 Wall. 108; *Shelton v. Platt*, 139 U. S. 591; *Allen v. Pullman's Palace Car Co.*, 139 U. S. 658; *Pittsburgh, etc. Ry. v. Board of Pub. Works*, 172 U. S. 32; *Arkansas Building & Loan Association v. Madden*, 175 U. S. 269; *Indiana Manufacturing Co. v. Koehne*, 188 U. S. 681; *Boise Artesian Water Co. v. Boise City*, 213 U. S. 276; *Singer Sewing Machine Co. v. Benedict*, 229 U. S. 481. This procedure is not inconsistent with state sovereignty. Other states, in similar situations, have heretofore proceeded in the ordinary way. *South Carolina v. United States*, 199 U. S. 437; *Board of Trustees v. United States*, 289 U. S. 48.

The bill of complaint concedes the principle stated in the foregoing authorities. It attempts to avoid the force of that rule by alleging supposed special circumstances which would cause it to suffer irreparable damage by paying the taxes and suing for refund.

It first alleges that such a course would delay the final adjudication of the validity of the taxes (Bill, pp. 24 and 25). But the fact that an otherwise adequate legal remedy may not be expeditious does not warrant the assumption of jurisdiction by equity unless the delay will be accompanied by irreparable injury to the complainant. Further it appears here that the taxes imposed by the Carriers Taxing Act for the first three quarters of 1937 became due at approximately the same time that complainant requested the Commissioner of Internal Revenue to determine the applicability of the Carriers Taxing Act of 1937 to the State Belt Railroad.* Had the complainant paid the tax and filed its claim for refund at that time it is reasonable to suppose that its claim would have been passed upon as promptly as its request for a decision was responded to and that it would, therefore, have had a

* The tax for the first three quarters of 1937 was due November 30, 1937 (United States Treasury Regulations 100, Articles 505-506). The complainant made its request to the Commissioner of Internal Revenue on November 13, 1937 (Bill, page 37).

ruling on its claim by February 19, 1938.* Complainant would then have been in a position to file its suit for refund in accordance with the usual procedure. Thus any urgency which it now asserts is entirely attributable to its own failure to pursue its legal remedy expeditiously.

Further to support its allegation that its legal remedy is inadequate, complainant alleges that the tax imposed upon it is "a very heavy tax" (Bill, p. 26). It appears that this tax in fact amounts to \$7,862.32 per year (Bill, p. 26).

It is further alleged by way of conclusion and without supporting facts that this amount, if collected by the Government, must be supplied from charges may by the complainant in the administration of San Francisco Harbor. No facts are stated to show that payment of the tax is not possible from other funds, and, in their absence, it can scarcely be assumed that payment of the amount stated would subject the State of California to financial embarrassment. Similarly, it is alleged that the payment of the tax would require a revision of the tariffs of the Board of Harbor Commissioners. But again no facts are stated showing an insufficiency of funds, even in the San Fran-

*In any event, complainant could have filed suit within six months after filing its claim with the Commissioner, even if the Commissioner had not acted upon it within that period (R. S., Sec. 3226, as amended by Sec. 1103, Revenue Act of 1932).

cisco Harbor improvement fund, to meet the amount of the tax pending the decision of a suit for refund. On the contrary, the bill of complaint alleges (p. 15) that all employees of the State Belt Railroad are members of the State Employees' Retirement System of the State of California. It appears, however, from Section 38 (b) of the State Employees' Retirement Act (Exhibit D to the proposed bill of complaint) that these employees are not members of the State Employees' Retirement System if they are determined to be employees under the Railroad Retirement Acts. It appears from Section 109 of the State Employees' Retirement Act that if complainant is correct in its contention that it is not an employer subject to the Railroad Retirement Acts and the Carriers Taxing Act, then complainant will be required to pay into the State Employees' Retirement Fund from the San Francisco Harbor improvement fund an amount equal to 3.75% of so much of the compensation of its employees as does not exceed \$416.66 per month for each employee. This amount is substantially in excess of the taxes imposed by the Carriers Taxing Act, Section 3 (a). Likewise, it appears from Section 67 of the State Employees' Retirement Act that if complainant is correct in its contention that it is not an employer under the Carriers Taxing Act and the Railroad Retirement Acts, it is required to deduct from the compensation of its employees and to pay into the State Employees' Retirement Fund

an amount not determinable from the face of the Act but which appears to be in excess of the amount which it would be required to deduct under the Carriers Taxing Act, Section 2.

It is thus apparent that in any event the complainant must adjust its affairs to meet either the taxes levied under the Carriers Taxing Act of 1937 or the substantially equivalent charges required under the State Employees' Retirement Act.

Complainant further alleges that pursuit of its legal remedy would put it to the trouble of quarterly payment of taxes, claims for refund and suits for recovery; that it would expose it to claims by its employees to their rights and privileges under the State Employees' Retirement System and for amounts deducted from their compensation pursuant to the Carriers Taxing Act of 1937. These claims come to nothing more than the inconvenience caused by a temporary uncertainty as to the applicability of the Federal or, in the alternative, the State plan for employees' benefits and the consequent necessity of the maintenance of proper accounts in order that the funds may ultimately be disposed of in accordance with the provisions of the law finally determined to be applicable. It is clear, however, that the inconveniences with which the complainant is now confronted are far from amounting to such irreparable injury as would warrant this court in exercising its extraordinary jurisdiction to enjoin the collection of taxes.

IV

THIS SUIT IS PROHIBITED BY SECTION 3224 OF THE
REVISED STATUTES

It has already been shown (Part III, A) that any burdens imposed upon complainant by the Railroad Retirement Act are insubstantial; the essence of the proposed proceeding is a suit to enjoin the collection of taxes imposed by the Carriers Taxing Act of 1937. But, apart from the fact that the bill alleges no facts sufficient to invoke the equity jurisdiction of this court, such relief is specifically forbidden by Section 3224 of the Revised Statutes (U. S. C., Title 26, Sec. 1543) which provides:

No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

1. This provision extends to the collection of all Federal taxes, even though the challenge to their validity is made upon constitutional grounds. *Snyder v. Marks*, 109 U. S. 189, 192; *Dodge v. Osborn*, 240 U. S. 118, 121; *Graham v. Du Pont*, 262 U. S. 234, 257. In *Bailey v. George*, 259 U. S. 16, this Court applied Section 3224 in denying an injunction against the collection of the Federal child labor tax, although on the same day it declared that tax unconstitutional in another case (*Bailey v. Drexel Furniture Company*, 259 U. S. 20). This established doctrine was not overruled *sub silentio* in

Rickert Rice Mills v. Fontenot, 297 U. S. 110. That case, under circumstances not unlike those of *Dodge v. Brady*, 240 U. S. 122, 126, merely determined that an injunction against the collection of a tax would be directed where it served to put an end to unnecessary litigation. In several cases this Court has, subsequent to the *Rickert Rice Mills* case, denied certiorari to courts which have refused to entertain a bill to enjoin the collection of taxes alleged to be unconstitutional.*

2. The complainant sets forth no circumstances which bring it within any of the exceptions to the operation of Section 3224. The tax in question is obviously not a criminal penalty in the nature of a fine. Compare *Lipke v. Lederer*, 259 U. S. 557; *Regal Drug Co. v. Wardell*, 260 U. S. 386. Nor does the bill set forth exceptional and extraordinary facts which show that collection of the tax would result in financial ruin to the State. Compare *Miller v. Nut Margarine Co.*, 284 U. S. 498; *Hill v. Wallace*, 259 U. S. 44. Indeed, as we have shown (*Point III, B, supra*), collection of these taxes would not involve any substantial injury to the complainant.

* *Huston v. Iowa Soap Co.*, 85 F. (2d) 649 (C. C. A. 8th), certiorari denied, 298 U. S. 657; *O'Malley v. Haskins Bros. & Co.*, 85 F. (2d) 657 (C. C. A. 8th), certiorari denied, 299 U. S. 594; *Steinhagen Rice Milling Co. v. Scofield*, 87 F. (2d) 804 (C. C. A. 5th), certiorari denied, 300 U. S. 663; *Sheridan Flouring Mills v. Cassidy*, 87 F. (2d) 20 (C. C. A. 10th), certiorari denied, 300 U. S. 664.

3. The fact that the proceeding is sought to be brought within the original jurisdiction of this Court does not take the complainant out of the operation of Section 3224. The statute recognizes that "taxes are the life-blood of government, and their prompt and certain availability an imperious need" (*Bull v. United States*, 295 U. S. 247, 259). Section 3224, devised to meet this need, stems from two Congressional powers. The Section represents a codification and reinforcement of the substantive equity rule against the restraint of tax collections (*State Railroad Tax Cases*, 92 U. S. 575, 613-614); and it represents a regulation of the jurisdiction of the Federal courts (*Dodge v. Osborn*, 240 U. S. 118). The fact that Congress might be unable to contract the original jurisdiction of this Court leaves the alternative basis of its power unaffected. It has, of course, power to prescribe both the substantive rules of law and the modes of proceeding applicable to the litigation in all courts, including the original jurisdiction of this Court. *Grayson v. Virginia*, 3 Dall. 320; *Florida v. Georgia*, 17 How. 478, 491.

It results that the provisions of Section 3224 forbid the maintenance of any suit such as the complainant seeks to bring, and this Court accordingly should deny leave to file the complaint.

THIS CAUSE IS NOT MAINTAINABLE IN THIS COURT SINCE THE UNITED STATES IS THE REAL DEFENDANT AND IT MAY NOT BE SUED WITHOUT ITS CONSENT

While the four individuals who are the nominal defendants in this suit are named in their individual as well as their official capacities, it is clear from the allegations of the bill that the actions which complainant seeks to enjoin will injure it, if at all, only by reason of the fact that the defendants are officials of the United States. The defendants have no individual interest in the enforcement of the Railroad Retirement Act and the Carriers Taxing Act. Under such circumstances the United States is the real party in interest and is an indispensable party to this proceeding. *Morrison v. Work*, 266 U. S. 481; *Lambert Co. v. Baltimore & Ohio Railroad Company*, 258 U. S. 377, 382; *Texas v. Interstate Com. Comm.*, 258 U. S. 158, 164; *North Dakota v. Chicago & N. W. Ry. Co.*, 257 U. S. 485; *Wells v. Roper*, 246 U. S. 335; *New Mexico v. Lane*, 243 U. S. 52; *Louisiana v. McAdoo*, 234 U. S. 627; *Louisiana v. Garfield*, 211 U. S. 70, 78; *Oregon v. Hitchcock*, 202 U. S. 60, 68, 69; *Minnesota v. Hitchcock*, 185 U. S. 373, 387; *Kansas v. Colorado*, 185 U. S. 125. See *Cummings v. Deutsche Bank*, 300 U. S. 115, 118; *Arizona v. California*, 283 U. S. 423; *Massachusetts v. Mellon*, 262 U. S. 447. Consequently, this suit may not be maintained, for the United States may not be sued

without its consent, even by a State. *Kansas v. United States*, 204 U. S. 331, 342.

The cases which hold that a suit against government officials is actually against the United States are not confined to those which hold that when the United States is in possession of property a suit affecting its title may not be brought. In both *Wells v. Roper*, *supra*, and *Louisiana v. McAdoo*, *supra*, the plaintiffs sought to interfere with the performance of official duties by officers of the United States, yet the Court held that those suits, which did not affect the title of the United States to property, were nevertheless in substance suits against the Federal Government. Similarly, in *North Dakota v. Chicago & N. W. Ry. Co.*, 257 U. S. 485, in which a State, by an original bill, sought to enjoin certain railway companies from applying an order of the Interstate Commerce Commission until this Court could review the decision upon which the order was made, the Court decided that it would be inequitable to enter a decree except in such form as to bind the Commission and the United States, and as the United States had not consented to a suit in this Court upon an original bill, the bill would have to be dismissed. To the same effect are *Texas v. Interstate Com. Comm.*, 258 U. S. 158, 164; *Lambert Co. v. Baltimore & Ohio R. R.*, 258 U. S. 377, 382.

The complainant cites four cases to support its contention that this is not a suit against the United

States: *Ohio v. Helvering*, 292 U. S. 360; *Hill v. Wallace*, 259 U. S. 44; *Philadelphia Company v. Stimson*, 223 U. S. 605; *Pennoyer v. McConnaughy*, 140 U. S. 1.

Ohio v. Helvering clearly is not relevant since the Court denied leave to file an original bill on other grounds and therefore apparently considered it unnecessary to pass upon this question.*

Hill v. Wallace likewise gives no support to complainant's position. Although this Court there sanctioned an injunction against the Collector of Internal Revenue and the United States Attorney, the question whether the suit was in fact one against the United States was neither argued by the parties nor considered by the court.

In *Philadelphia Co. v. Stimson*, the charge was that the Secretary of War and other officers of the War Department were in effect committing a trespass upon plaintiff's property, and were threatening to prosecute criminal actions, in connection with the fixing of a harbor line. The Court held that it had jurisdiction to determine whether the action of the Secretary of War was legal. The same result was reached under similar circumstances in *Goltra v. Weeks*, 271 U. S. 536, where the plaintiff sought to enjoin the seizure of a fleet.

*The Court by citing (p. 368) *Ex parte Bakelite Corp.*, 279 U. S. 438, 448, and *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 553, plainly indicated that its decision was not to be taken as a holding on the propriety of the suit.

of towboats by the Secretary of War and Army Officers who were charged with a conspiracy to deprive him of the boats which he alleged belonged to him. In the *Goltra* case, however, the Court pointed out the distinction between the *Stimson* case and cases like *Wells v. Roper, supra*, in which the First Assistant Postmaster General had annulled a contract between the plaintiff and the United States by which the plaintiff was to use his cars to carry the mail. The Court pointed out that in the *Stimson* case the defendants threatened "a trespass upon the property of the plaintiff," whereas in *Wells v. Roper* "the automobiles of the plaintiff were not to be taken away from him by the government officers." See also *Louisiana v. McAdoo, supra*. In the present case, since no trespass or seizure of complainant's property is threatened, the *Stimson* case and *Goltra v. Weeks*, do not apply. Moreover, it is clear that an allegation that the statute under which the defendant officers are acting is unconstitutional is not enough to sustain jurisdiction, if the suits are in fact against the sovereign. *Hagood v. Southern*, 117 U. S. 52; *In re Ayers*, 123 U. S. 443.

Pennoyer v. McConnaughy, also relied upon by complainant, is similar to the *Stimson* case in that the threatened action of the defendant, the conveyance to another of lands to which the plaintiff had title, constituted in and of itself the creation of a cloud upon the plaintiff's title. Such action

is tortious in nature and necessarily subjects the defendant to liability or injunctive restraint unless he can show authority of law for his action.

Action of the character enjoined in the *Stimson* and *McConaughy* cases is entirely different from that complained of here. The decisions of the Railroad Retirement Board and the Commissioner of Internal Revenue that the Railroad Retirement and Carriers Taxing Acts are applicable to complainant, even if incorrect, cannot be regarded as tortious. If, pursuant to these decisions, the Board makes orders requiring records and information, or the Collector of Internal Revenue attempts without restraint to collect taxes, their action, taken in the discharge of official duties, can impinge upon complainant only through the intervention of normal judicial processes and subject to full judicial review.

It is further submitted that the United States has a peculiarly direct interest in an action by which the collection of its taxes is sought to be enjoined. Taxes are "the sole means by which sovereignties can maintain their existence." *Bank of Commerce v. Tennessee*, 161 U. S. 134, 146. See *Bull v. United States*, 295 U. S. 247, 259. The case is quite different from a suit to enjoin the enforcement of excessive or discriminatory rates by public service corporations (*Prendergast v. New York Telephone Co.*, 262 U. S. 43; *Oklahoma Gas Co. v. Russell*, 261 U. S. 290) for the State has no pecu-

niary interest in such an action. When the taxes are collected the title to them vests in the United States, which is consequently vitally interested in enforcing their payment. Cf. *Goldberg v. Daniels*, 231 U. S. 218; *Minnesota v. Hitchcock*, 185 U. S. 373. The officials who are made the nominal defendants have no pecuniary interest in the tax. The question whether the United States is the real party in interest must be determined by the effect of the judgment or decree which can be entered (*Minnesota v. Hitchcock*; *Oregon v. Hitchcock*, *supra*). The primary effect of a decree for the complainant here will be to deprive the United States of revenue. Hence, we submit, the United States is the real party in interest. Its presence is indispensable but it cannot be joined. Hence leave to file the bill should be denied.

VI

THE ISSUES PRESENTED BY COMPLAINANT HAVE CLEARLY BEEN DECIDED AGAINST IT BY PREVIOUS DECISIONS OF THIS COURT

We are confident that, for the reasons already advanced, the complainant is not entitled to proceed in this Court. However, there is a further and alternative reason why leave to file the proposed bill should be denied. Complainant's case is without merit because previous decisions of this Court have completely disposed of all substantive questions which it presents. Compare *Ohio v. Helvering*, 292 U. S. 360.

1. The application of the Railroad Retirement Acts and the Carriers Taxing Act of 1937 to the State Belt Railroad presents no new question of statutory construction. These Acts are expressly made applicable to any "carrier by railroad, subject to Part I of the Interstate Commerce Act." Railroad Retirement Act of 1937, Sections 1 (a), 1 (m); Railroad Retirement Act of 1935, Section 1 (a); Carriers Taxing Act, Sections 1 (a), 1 (i). In *United States v. California*, 297 U. S. 175, 186, this Court recognized that the State Belt Railroad is a carrier by railroad subject to Part I of the Interstate Commerce Act, citing *California Canneries Co. v. Southern Pacific Co.*, 51 I. C. C. 500, which so decided. This Court has, therefore, passed upon the status of the specific instrumentality here involved and in so doing has decided the sole question of statutory construction which the complainant now presents.

2. It is not entirely clear whether, in addition to the question of statutory construction, the proposed bill charges that the Acts in question are unconstitutional if they are applicable to the State Belt Railroad. Complainant's brief in support of its motion for leave to file the bill asserts (p. 6) that these Acts are unconstitutional as applied to it, presumably on the ground that they invade its sovereign immunity from Federal taxation or interference. If the bill may be said properly to raise this constitutional question (see pp. 20 and 30).

it is one which has likewise conclusively been disposed of by previous decisions of this Court.

a. In *United States v. California, supra*, this Court held the operation of the State Belt Railroad to be subject to Federal regulation under the commerce power, and to the penalty imposed by Federal law for failure to comply with such regulation. If, as complainant alleges, the Railroad Retirement Act of 1935, the Railroad Retirement Act of 1937, and the Carriers Taxing Act of 1937, on account of their interrelationship and substantial singleness of purpose constitute one legislative enactment having for its sole purpose the establishment and operation of a pension system and the provision of funds to supply annuities and disability and death benefits to the members of such system," then, notwithstanding the fact that the complaint is in part directed against an exercise of the taxing power, the proper criterion of state immunity is its immunity as against the regulatory powers of Congress rather than its immunity to ordinary taxation. *Board of Trustees v. United States*, 289 U. S. 48.

b. Insofar as the bill raises any question of an immunity of the State Belt Railroad from the Federal taxing power as such, it seems plain enough that the Railroad's activities do not constitute an essential governmental function of the State. We see no reason to distinguish the operations of a belt line railroad from those of the elevated railway

considered in *Helvering v. Powers*, 293 U. S. 214. In each case, "the State, with its own conception of public advantage, is undertaking a business enterprise of a sort that is normally within the reach of the Federal taxing power and is distinct from the usual governmental functions that are immune from Federal taxation in order to safeguard the necessary independence of the State" (p. 227). See also *South Carolina v. United States*, 199 U. S. 437; *Ohio v. Helvering*, *supra*; *Helvering v. Therrell*, No. 128, this Term.

c. The activities of the State Belt Railroad are subject to the full scope of the commerce power of Congress. *United States v. California*, *supra*. It was argued in *Helvering v. Gerhardt*, Nos. 779-781, now pending before this Court, that, since the State has no independence of the Federal government when it engages in interstate commerce, there is no reason to extend it immunity from the Federal taxing power. See *Helvering v. Powers*, *supra*, 225; *Willcuts v. Bunn*, 282 U. S. 216, 225. If the Court should approve this branch of the Government's argument in the *Gerhardt* case, there would, of course, be no basis for a claim of tax immunity on the part of the State Belt Road.

Accordingly, it seems that in this case, as fully as in *Ohio v. Helvering*, *supra*, leave to file the bill of complaint might well be denied because the questions sought to be raised by the bill have so clearly been decided against the complainant by the prior

decisions of this Court. See, also, *Florida v. Mellon*, 273 U. S. 12, 17.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the motion for leave to file the bill of complaint should be denied and the rule to show cause discharged.

However, should the Court determine to grant the motion, we respectfully request leave to answer the bill of complaint for the purpose of denying certain of the allegations contained therein.

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APPENDIX

Article III, Section 2, Clauses 1 and 2 of the Constitution:

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * * to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between citizens of different States; between citizens of the same State claiming Lands under Grants of different States; and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations as the Congress shall make.

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[PUBLIC—No. 399—74TH CONGRESS]

[H. R. 8651]

AN ACT

To establish a retirement system for employees of carriers subject to the Interstate Commerce Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

DEFINITIONS

SECTION 1. For the purposes of this Act—

(a) The term "carrier" means any express company, sleeping-car company, or carrier by railroad, subject to the Interstate Commerce Act, and any company which may be directly or indirectly owned or controlled thereby or under common control therewith, and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of and operating the business of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, inter-urban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso.

(b) The term "employee" means any person (1) who shall be at the enactment hereof or shall have been at any time after the enactment hereof in the service of a carrier, or who shall be at the enactment hereof or shall have been at any time after the enactment hereof in the employment relation to a carrier, and (2) each officer or other official representative of an "employee organization", herein called "representative" who before or after the enactment hereof has performed service for a carrier, who at the enactment hereof or at any time after the enactment is or shall be duly designated and authorized to represent employees in accordance with the Railway Labor Act, and who, during, or immediately following employment by a carrier, is, shall be, or shall have been engaged in such representative service in behalf of such employees.

(c) A person shall be deemed to be in the service of a carrier whenever he may be subject to its continuing authority to supervise and direct the manner of rendition of his service, for which service he receives compensation.

(d) A person is in the employment relation to a carrier when furloughed or on leave of absence, and subject to call for service and ready and willing to serve, all in accordance with the established rules and practices usually in effect on railroads.

(e) The term "service period" means the total service of a person for one or more carriers whether or not continuously performed either before or after the effective date, and includes as one month every calendar month during which such person has rendered service to a carrier for compensation and includes as one year every twelve such months. An ultimate fraction of six months or more shall be computed as one year.

(f) The term "annuity" means a fixed sum payable at the beginning of each month during retirement, ceasing at death except as otherwise provided in section 5 hereof or at resumption of service for which an employee receives compensation.

(g) The term "compensation" means any form of money remuneration for service, received by an employee from a carrier, including salaries and commissions, but shall not include free transportation nor any payment received on account of sickness, disability, pensions, or other form of relief.

(h) The term "retirement" means the status of cessation of compensated service with the right to receive an annuity.

(i) The term "age" means age at the latest attained birthday.

(j) The term "Board" means the Railroad Retirement Board.

(k) The term "effective date" means the 1st day of March 1936.

(l) The term "enactment" means the date on which this Act shall become a law.

RETIREMENT

SEC. 2. Upon the attainment of sixty-five years of age and continuance in service by the employee (but not before the effective date of this Act), the annuity of such employee shall be reduced one-fifteenth for every year of such continued service beyond the age of sixty-five years; except that such reduction shall not apply during any period, beginning at the age of sixty-five and not extending beyond the age of seventy, while the employee is continued in employment under an agreement in writing between the carrier and employee filed with the Board, which agreement may provide for extension of employment for one year and thereafter in like manner for successive periods of one year each. Such reduction of annuity shall not apply to an employee who occupies an official position in the service of a carrier or to employees' representatives.

ANNUITIES

SEC. 3. The following-described employees, after retirement whether or not then in the service of a carrier, shall be paid annuities:

(a) A person (without regard to the period of service and whether rendered before or after the enactment hereof), who either at the enactment hereof or thereafter shall be sixty-five years of age or over.

(b) A person who either at the enactment hereof or who thereafter shall be fifty years of age or over and who shall have completed a

service period of thirty years. An annuity paid under this subdivision shall be reduced by one-fifteenth of such annuity for each year such employee may be less than sixty-five years of age at the time of the first annuity payment.

(c) A person who either before or after the enactment shall have completed a service period of thirty years and who shall be after the enactment hereof retired by the carrier on account of mental or physical disability. An annuity paid under this subdivision shall not be subject to the deduction specified in subdivision (b) of this section.

The annuities hereinbefore mentioned shall be paid out of any money in the Treasury which may be appropriated for that purpose. An annuity shall begin as of a date to be specified in a written application to be signed by the employee entitled thereto, and approved by the Board, which date shall not be more than sixty days before the filing of the application, nor before the date on which the first annuity shall have become due and payable. An annuity shall not be due and payable until ninety days after the effective date hereof. The annuity shall be payable on the 1st day of the month during the lifetime of the annuitant. Such annuity shall be based upon the service period of the employee and shall be the sum of the amounts determined by multiplying the total number of years of service not exceeding thirty years by the following percentages of the monthly compensation: 2 per centum of the first \$50; $1\frac{1}{2}$ per centum of the next \$100; and 1 per centum of the compensation in excess of \$150. The "monthly compensation" shall be the average of the monthly compensation paid to the employee by the carrier, except that where applicable for service before the effective date the monthly compensation shall be the average of the monthly compensation for all pay-roll periods for which the employee shall have received compensation from any carrier out of eight consecutive calendar years of such services ended December 31, 1931. No part of any monthly compensation in excess of \$300 shall be recognized in determining any annuity. Any employee who shall be entitled to an annuity with a commuted value determined by the Board of less than \$300 shall be paid such value in a lump sum.

ANNUITIES TO REPRESENTATIVES

SEC. 4. The annuity of a representative shall be determined according to such rules and regulations as the Board shall deem just and reasonable and, as near as may be, shall be the same annuity as if the representative were still in the employ of his last former carrier.

PAYMENTS UPON DEATH

SEC. 5. If a person receiving or entitled to receive an annuity shall die, the Board, for one year after the first day of the month in which the death may have occurred, shall pay, as herein provided, an annuity equal to one-half of the annuity which such person so dying may have received or may have been entitled to receive, to the widow or widower of the deceased, or if there be no widow or widower, to the dependent next of kin of the deceased. Any employee may elect, on making application for an annuity, to have

the present value of the annuity apply to the payment of a reduced annuity to the employee during life and an annuity during the life of a surviving spouse. The present values and amounts of the annuity payments shall be determined on the basis of the combined annuity tables with interest at 3 per centum per annum.

RETIREMENT BOARD

PERSONNEL

SEC. 6. (a) There is hereby established as an independent agency in the executive branch of the Government a Railroad Retirement Board, to be composed of three members appointed by the President, by and with the advice and consent of the Senate. Each member shall hold office for a term of five years, except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of the term and the terms of office of the members first taking office after the date of enactment of this Act shall expire, as designated by the President, one at the end of two years, one at the end of three years, and one at the end of four years, after the date of enactment of this Act. One member shall be appointed from recommendations made by representatives of the employees and one member shall be appointed from recommendations made by representatives of the carriers, in both cases as the President shall direct, so as to provide representation on the Board satisfactory to the largest number, respectively, of employees and carriers concerned. One member, who shall be the chairman of the Board, shall be appointed initially, for a term of two years without recommendation by either carriers or employees and shall not be in the employment of or be pecuniarily or otherwise interested in any carrier or organization of employees. Vacancies in the Board shall not impair the powers nor affect the duties of the Board nor of the remaining members of the Board of whom a majority of those in office shall constitute a quorum for the transaction of business. Each of said members shall receive a salary of \$10,000 per year, together with necessary traveling expenses and subsistence expenses, or per diem allowance in lieu thereof, while away from the principal office of the Board on duties required by this Act.

DUTIES

(b) The Board shall have and exercise all the duties and powers necessary to administer this Act. The Board shall take such steps as may be necessary to enforce this Act and make and certify awards and payments.

The Board shall from time to time certify to the Secretary of the Treasury the name and address of each person entitled to receive a payment under this Act, the amount of such payment, and the time at which it should be made, and the Secretary of the Treasury through the Division of Disbursement of the Treasury Department, and prior to audit or settlement by the General Accounting Office, shall make payment in accordance with the certification by the Board.

The Board shall establish and promulgate rules and regulations and provide for the adjustment of all controversial matters, with power as a Board or through any member or subordinate designated thereof, to require and compel the attendance of witnesses, administer oaths, take testimony, and make all necessary investigations in any matter involving annuities or other payments, and shall maintain such offices, provide such equipment, furnishings, supplies, services, and facilities, and employ such persons and provide for their compensation and expenses, as may be necessary to the proper discharge of its functions. All rules, regulations, or decisions of the Board shall require the approval of at least two members and shall be entered upon the records of the Board which shall be a public record. The Board shall gather, keep, compile, and publish in convenient form such records and data as may be necessary, and at intervals of not more than two years shall cause to be made actuarial surveys and analyses, to determine from time to time the payments to be required to provide for all annuities, other disbursements, and expenses, and to assure proper administration and the adequacy and permanency of the retirement system hereby established. The Board shall have power to require all carriers and employees and any officer, board, commission, or other agency of the United States to furnish such information and records as shall be necessary for the administration of this Act. The Board shall make an annual report to the President of the United States to be submitted to Congress. Witnesses summoned before the Board shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

SPECIAL REPORT

SEC. 7. Not later than four years from the effective date, the Board, in a special report to the President of the United States to be submitted to Congress, shall make specific recommendations for such changes in the retirement system hereby created as shall assure the adequacy of said retirement system on the basis of its experience and all information and experience then available. For this purpose the Board shall from time to time make such investigations and actuarial studies as shall provide the fullest information practicable for such report and recommendations. The Board shall in a like special report to be made at the earliest practicable time, make specific recommendations with regard to the desirability and practicability of substituting the provisions for annuities and other benefits to employees under this Act for any obligation for prior service or for any existing provisions for the voluntary payment of pensions to employees subject to this Act by a carrier or any employees subject to this Act, so as to relieve such carrier from its obligations for age retirement benefits under its existing pension systems and transfer such obligations to the retirement system herein established.

It is recognized that existing individual carrier pension plans are wholly at the option of the carriers unless in any case express provision is made otherwise, and no restriction is imposed under this Act upon such plans; nor is it expected that carriers will modify existing pension plans on account of this Act beyond a reduction of current pension payments under such existing plans in amounts equal to the annuity payments currently received by the employee under this Act.

INVESTIGATION COMMISSION

SEC. 8. (a) That a commission be appointed which shall be composed of three Members of the Senate designated by the President of the Senate; three Members of the House of Representatives designated by the Speaker of the House of Representatives; and three members who shall be designated by the President of the United States. The President shall designate one member to be chairman and another to be vice chairman of the Commission. The Commission is hereby authorized and directed to make and report through the President to the Congress of the United States not later than January 1, 1936, the results of, a thorough investigation of all pertinent facts relating to a retirement annuity system applicable by law to carriers by railroad engaged in interstate commerce and particularly any and all questions for the investigation of which provision is made under the preceding section. The Commission is also authorized to hold hearings respecting desirable provisions of a sound retirement and annuity system. In the making of such investigation the Commission may consider the experience of other industries and of governments, as well as of the railroad industry, and may avail itself of the assistance of all agencies of the Federal Government. Until January 1, 1936, the duties and authority of the Board under the preceding section are limited to cooperation with and action under the direction of the Commission. With its report setting forth the results of its investigation, the Commission shall include such recommendations for legislation, if any, as it may deem necessary to give effect to its conclusions.

(b) The Commission, in the performance of its duties, is authorized to sit and act at such times and places either in the District of Columbia or elsewhere during the sessions, recesses, and adjourned periods of the Seventy-fourth Congress, to require by subpoena or otherwise the attendance of such witnesses and the production and impounding of such books, papers, records, files, and documents, to have access to such books, papers, records, files, and documents of any corporation or person, to administer such oaths and to take such testimony and to make such expenditures, as it may deem advisable. The several district courts of the United States and the Supreme Court of the District of Columbia shall have jurisdiction upon application by the Commission through its attorneys to compel obedience to any order or subpoena of the Commission issued pursuant to this section. The orders, writs, and processes of the Supreme Court of the District of Columbia in such matters may run and be served anywhere in the United States.

(c) The Commission shall maintain such offices, provide such equipment, furnishings, supplies, services, and facilities, and to employ, without regard to the provisions of the Civil Service Act such experts and clerical, stenographic, legal, and other assistance as may be necessary for the proper discharge of its duties, and without respect to the provisions of the Classification Act of 1923, as amended, fix the compensation of any person employed. The President shall fix the compensation to be paid the three members of the Commission to be appointed by the President. All expenses of the Commission for all time in which the Commission shall be actually engaged in this investigation shall be paid out of any funds

in the Treasury of the United States, not otherwise appropriated, on a certificate of the chairman of the Commission, and the sum necessary for carrying out the provisions of this resolution is hereby authorized to be appropriated: *Provided*, That the total expense authorized for the purposes of the Commission shall not exceed the sum of \$60,000 which shall include the compensation herein authorized.

COURT JURISDICTION

SEC. 9. The several District Courts of the United States and the Supreme Court of the District of Columbia, respectively, shall have jurisdiction to entertain an application and to grant appropriate relief in the following cases which may arise under the provisions of this Act:

(a) An application by an employee or other person aggrieved in or to the district court of any district wherein the Board may have established an office, to compel the Board to set aside an action or decision claimed to be in violation of a legally enforceable right of the applicant, or to take action, or to make a decision necessary for the enforcement of a legal right of the applicant.

(b) The jurisdiction herein specifically conferred upon the said Federal courts shall not be held exclusive of any jurisdiction otherwise possessed by said courts to entertain actions at law or suits in equity in aid of the enforcement of rights or obligations arising under the provisions of this Act.

(c) The Railroad Retirement Board, as hereinbefore established, shall be and constitute a body corporate and be capable of suing and being sued as such.

EXEMPTION

SEC. 10. No annuity payment shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated.

PENALTIES

SEC. 11. Any officer or agent of a carrier, as the word "carrier" is hereinbefore defined, or any employee as such word is hereinbefore defined, or any person whether or not of the character hereinbefore defined, who shall willfully fail or refuse to make any report or furnish any information required by the Board in the administration of this Act, or who shall knowingly make any false or fraudulent statement or report in response to any report or statement required to be made for the purpose of this Act, or who shall knowingly make or aid in making any false or fraudulent statement or claim for the purpose of receiving any award or payment under this Act, shall be punished by a fine of not less than \$100 nor more than \$10,000 or by imprisonment not exceeding one year.

SEPARABILITY

SEC. 12. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act or application of such provision to other persons or circumstances shall not be affected thereby.

APPROPRIATION AUTHORIZED

SEC. 13. The appropriation of such money from time to time out of the Treasury of the United States as may be necessary to carry this Act into effect, is hereby authorized.

SHORT TITLE

SEC. 14. This Act may be cited as the "Railroad Retirement Act of 1935".

SEC. 15. The term "employment", as defined in subsection (b) of section 210 of Title II of the Social Security Act, shall not include service performed in the employ of a carrier as defined in subdivision (a) of section 1 of the Railroad Retirement Act of 1935.

Approved, August 29, 1935.

[PUBLIC—No. 162—75TH CONGRESS]

[CHAPTER 382—1ST SESSION]

[H. R. 7519]

AN ACT

To amend an Act entitled "An Act to establish a retirement system for employees of carriers subject to the Interstate Commerce Act, and for other purposes", approved August 29, 1935.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

PART I

That the Act of August 29, 1935, entitled "An Act to establish a retirement system for employees of carriers subject to the Interstate Commerce Act, and for other purposes", be, and it is hereby, amended to read as follows:

"DEFINITIONS

"SECTION 1. For the purposes of this Act—

"(a) The term 'employer' means any carrier (as defined in subsection (m) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer: *Provided, however,* That the term 'employer' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Board, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term 'employer' shall also include railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services in connection with or incidental to railroad transportation; and railway labor organizations, national in scope, which have been or may be organized in accordance with the provisions of

the Railway Labor Act, as amended, and their State and National legislative committees and their general committees and their insurance departments and their local lodges and divisions, established pursuant to the constitution and bylaws of such organizations.

"(b) The term 'employee' means (1) any individual in the service of one or more employers for compensation, (2) any individual who is in the employment relation to one or more employers, and (3) an employee representative. The term 'employee' shall include an employee of a local lodge or division defined as an employer in subsection (a) only if he was in the service of or in the employment relation to a carrier on or after the enactment date. The term 'employee representative' means any officer or official representative of a railway labor organization other than a labor organization included in the term 'employer' as defined in section 1 (a) who before or after the enactment date was in the service of an employer as defined in section 1 (a) and who is duly authorized and designated to represent employees in accordance with the Railway Labor Act, as amended, and any individual who is regularly assigned to or regularly employed by such officer or official representative in connection with the duties of his office.

"(c) An individual is in the service of an employer whether his service is rendered within or without the United States if he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, which service he renders for compensation: *Provided, however,* That an individual shall be deemed to be in the service of an employer not conducting the principal part of its business in the United States only when he is rendering service to it in the United States.

"(d) An individual is in the employment relation to an employer if he is on furlough, subject to call for service within or outside the United States and ready and willing to serve, or on leave of absence, or absent on account of sickness or disability; all in accordance with the established rules and practices in effect on the employer: *Provided, however,* That an individual shall not be deemed to have been on the enactment date in the employment relation to an employer not conducting the principal part of its business in the United States unless during the last pay-roll period in which he rendered service to it prior to the enactment date, he rendered service to it in the United States.

"(e) The term 'United States', when used in a geographical sense, means the States, Alaska, Hawaii, and the District of Columbia.

"(f) The term 'years of service' shall mean the number of years an individual as an employee shall have rendered service to one or more employers for compensation or received remuneration for time lost, and shall be computed in accordance with the provisions of section 3 (b): *Provided, however,* That where service prior to the enactment date may be included in the computation of years of service as provided in subdivision (1) of section 3 (b), it may be included as to service rendered to a person which was on the enactment date an employer, irrespective of whether, at the time such service was rendered, such person was an employer; and it may also be included as to service rendered to any express company, sleeping-car company, or carrier by railroad which was a predecessor of a company which, on

the enactment date, was a carrier as defined in subsection (m), irrespective of whether, at the time such service was rendered to such predecessor, it was an employer. Twelve calendar months, consecutive or otherwise, in each of which an employee has rendered such service or received such wages for time lost, shall constitute a year of service. An ultimate fraction of six months or more shall be taken as one year. An ultimate fraction of less than six months shall be taken at its actual value.

"(g) The term 'annuity' means a monthly sum which is payable on the 1st day of each calendar month for the accrual during the preceding calendar month.

"(h) The term 'compensation' means any form of money remuneration earned by an individual for services rendered as an employee to one or more employers, or as an employee representative, including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost. Such term does not include tips, or the voluntary payment by an employer, without deduction from the remuneration of the employee, of any tax now or hereafter imposed with respect to the compensation of such employee.

"(i) The term 'Board' means the Railroad Retirement Board.

"(j) The term 'enactment date' means the 29th day of August 1935.

"(k) The term 'company' includes corporations, associations, and joint-stock companies.

"(l) The term 'employee' includes an officer of an employer.

"(m) The term 'carrier' means an express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act.

"(n) The term 'person' means an individual, a partnership, an association, a joint-stock company, or a corporation.

"ANNUITIES

"SEC. 2. (a) The following-described individuals, if they shall have been employees on or after the enactment date, shall, subject to the conditions set forth in subsections (b), (c), and (d), be eligible for annuities after they shall have ceased to render compensated service to any person, whether or not an employer as defined in section 1 (a) (but with the right to engage in other employment to the extent not prohibited by subsection (d)):

"1. Individuals who on or after the enactment date shall be sixty-five years of age or over.

"2. Individuals who on or after the enactment date shall be sixty years of age or over and (a) either have completed thirty years of service or (b) have become totally and permanently disabled for regular employment for hire, but the annuity of such individuals shall be reduced one one-hundred-and-eightieth for each calendar month that they are under age sixty-five when the annuity begins to accrue.

"3. Individuals, without regard to age, who on or after the enactment date are totally and permanently disabled for regular employment for hire and shall have completed thirty years of service.

"Such satisfactory proof of the permanent total disability and of the continuance of such disability until age sixty-five shall be

made from time to time as may be prescribed by the Board. If the individual fails to comply with the requirements prescribed by the Board as to proof of the disability or the continuance of the disability until age sixty-five, his right to an annuity under subdivision 2 or subdivision 3 of this subsection by reason of such disability shall, except for good cause shown to the Board, cease, but without prejudice to his rights under subdivision 1 or 2 (a) of this subsection. If, prior to attaining age sixty-five, such an individual recovers and is no longer disabled for regular employment for hire, his annuity shall cease upon the last day of the month in which he so recovers and if after such recovery the individual is granted an annuity under subdivision 1 or 2 (a) of this subsection, the amount of such annuity shall be reduced on an actuarial basis to be determined by the Board so as to compensate for the annuity previously received under this subdivision.

"(b) An annuity shall be paid only if the applicant shall have relinquished such rights as he may have to return to the service of an employer and of the person by whom he was last employed; but this requirement shall not apply to the individuals mentioned in subdivision 2 (b) and subdivision 3 of subsection (a) prior to attaining age sixty-five.

"(c) An annuity shall begin to accrue as of a date to be specified in a written application (to be made in such manner and form as may be prescribed by the Board and to be signed by the individual entitled thereto), but—

"(1) not before the date following the last day of compensated service of the applicant, and

"(2) not more than sixty days before the filing of the application.

"(d) No annuity shall be paid with respect to any month in which an individual in receipt of an annuity hereunder shall render compensated service to an employer or to the last person by whom he was employed prior to the date on which the annuity began to accrue. Individuals receiving annuities shall report to the Board immediately all such compensated service.

"COMPUTATION OF ANNUITIES

"Sec. 3. (a) The annuity shall be computed by multiplying an individual's 'years of service' by the following percentages of his 'monthly compensation': 2 per centum of the first \$50; 1½ per centum of the next \$100; and 1 per centum of the next \$150.

"(b) The 'years of service' of an individual shall be determined as follows:

"(1) In the case of an individual who was an employee on the enactment date, the years of service shall include all his service subsequent to December 31, 1936, and if the total number of such years is less than thirty, then the years of service shall also include his service prior to January 1, 1937, but not so as to make his total years of service exceed thirty: *Provided, however,* That with respect to any such individual who rendered service to any employer after January 1, 1937, and who on the enactment date was not an employee of an employer conducting the principal part of its business in the United States no greater proportion of his service

rendered prior to January 1, 1937, shall be included in his 'years of service' than the proportion which his total compensation (including compensation in any month in excess of \$300) for service after January 1, 1937, rendered anywhere to an employer conducting the principal part of its business in the United States or rendered in the United States to any other employer bears to his total compensation (including compensation in any month in excess of \$300) for service rendered anywhere to an employer after January 1, 1937.

"(2) In all other cases, the years of service shall include only the service subsequent to December 31, 1936.

"(3) Where the years of service include only part of the service prior to January 1, 1937, the part included shall be taken in reverse order beginning with the last calendar month of such service.

"(4) In no case shall the years of service include any service rendered after June 30, 1937, by an individual who is sixty-five years of age or over, except for the purpose of computing his monthly compensation as provided in subsection (c) of this section.

"(c) The 'monthly compensation' shall be the average compensation earned by an employee in calendar months included in his 'years of service', except (1) that with respect to service prior to January 1, 1937, the monthly compensation shall be the average compensation earned by an employee in calendar months included in his years of service in the years 1924-1931, and (2) that where service in the period 1924-1931 is, in the judgment of the Board, insufficient to constitute a fair and equitable basis for determining the monthly compensation for service prior to January 1, 1937, the Board shall determine the monthly compensation for such service in such manner as in its judgment shall be just and equitable. If the employee earned compensation after June 30, 1937, and after the last day of the month in which he attained age sixty-five, such compensation shall be disregarded if the result of taking such compensation into account would be to diminish his annuity. In computing the monthly compensation, no part of any month's compensation in excess of \$300 shall be recognized.

"(d) The annuity of an individual who shall have been an employee representative shall be determined in the same manner and with the same effect as if the employee organization by which he shall have been employed were an employer.

"(e) If the individual was an employee when he attained age sixty-five and has completed twenty years of service, the minimum annuity payable to him shall be \$40 per month. *Provided, however,* That if the monthly compensation on which his annuity is based is less than \$50, his annuity shall be 80 per centum of such monthly compensation, except that if such 80 per centum is less than \$20, the annuity shall be \$20 or the same amount as the monthly compensation, whichever is less. In no case shall the value of the annuity be less than the value of the additional old-age benefit he would receive under title II of the Social Security Act if his service as an employee after December 31, 1936, were included in the term 'employment' as defined therein.

"(f) Annuity payments due an individual but not yet paid at death shall be paid to a surviving spouse if such spouse is entitled

to an annuity under an election made pursuant to the provisions of section 4; otherwise they shall be paid to the same individual or individuals who may be entitled to receive any death benefit that may be payable under the provisions of section 5.

"(g) No annuity shall accrue with respect to the calendar month in which an annuitant dies.

"(h) After an annuity has begun to accrue, it shall not be subject to recomputation on account of service rendered thereafter to an employer, except as provided in subdivision 3 of section 2 (a).

"(i) If an annuity is less than \$2.50, it may, in the discretion of the Board, be paid quarterly or in a lump sum equal to its commuted value as determined by the Board.

"JOINT AND SURVIVOR ANNUITY

"SEC. 4. An individual whose annuity shall not have begun to accrue may elect prior to January 1, 1938, or at least five years before the date on which his annuity begins to accrue, or upon furnishing proof of health satisfactory to the Board, to have the value of his annuity apply to the payment of a reduced annuity to him during life and an annuity after his death to his spouse during life equal to, or 75 per centum of, or 50 per centum of such reduced annuity. The amounts of the two annuities shall be such that their combined actuarial value as determined by the Board shall be the same as the actuarial value of the single-life annuity to which the individual would otherwise be entitled. Such election shall be irrevocable, except that it shall become inoperative if the individual or the spouse dies before the annuity begins to accrue or if the individual's marriage is dissolved or if the individual shall be granted an annuity under subdivision 3 of section 2 (a); *Provided, however,* that the individual may, if his marriage is dissolved before the date his annuity begins to accrue, or if his annuity under subdivision 3 of section 2 (a) ceases because of failure to make the required proof of disability, make a new election under the conditions stated in the first sentence of this subsection. The annuity of a spouse under this subsection shall begin to accrue on the first day of the calendar month in which the death of the individual occurs.

"DEATH BENEFITS

"SEC. 5. The following benefits shall be paid with respect to the death of individuals who were employees after December 31, 1936:

"(a) If the deceased should not be survived by a widow or widower who is entitled to an annuity under an election made pursuant to the provisions of section 4, there shall be paid to such person or persons as the deceased may have designated by a writing filed with the Board prior to his death, or if there be no designation, to the legal representative of the deceased, the amount, if any, by which 4 per centum of the aggregate compensation earned by the deceased after December 31, 1936, exceeds the sum of the total of the annuity payments actually made to the deceased plus the total of the annuity payments due the deceased but not yet paid at death. If the person or persons designated to receive the death benefit do not survive the deceased, the death benefit shall be paid to the legal representative of the deceased.

"(b) If the deceased should be survived by a widow or widower entitled to an annuity under an election made pursuant to the provisions of section 4, there shall, on the death of the widow or widower, be paid to such person or persons as the deceased may have designated by a writing filed with the Board prior to his death, or if there be no designation, to the legal representative of the deceased, the amount, if any, by which 4 per centum of the aggregate compensation earned by the deceased after December 31, 1936, exceeds the sum of the total of the annuity payments actually made to the deceased plus the total of the annuity payments actually made to the widow or widower under an election made pursuant to the provisions of section 4 and under the provisions of section 3 (f), plus the total of the annuity payments due the widow or widower but not yet paid at death. If the person or persons designated to receive the death benefit do not survive the widow or widower, the death benefit shall be paid to the legal representative of the deceased.

"In computing the aggregate compensation for the purpose of this section, no part of any month's earnings in excess of \$300 shall be recognized.

"PENSIONS TO INDIVIDUALS ON PENSION OR GRATUITY ROLLS OF EMPLOYERS

"SEC. 6. (a) Beginning July 1, 1937, each individual then on the pension or gratuity roll of an employer by reason of his employment, who was on such roll on March 1, 1937, shall be paid on July 1, 1937, and on the 1st day of each calendar month thereafter during his life, a pension at the same rate as the pension or gratuity granted to him by the employer without diminution by reason of a general reduction or readjustment made subsequent to December 31, 1930, and applicable to pensioners of the employer: *Provided, however,* That no pension payable under this section shall exceed \$120 monthly: *And provided further,* That no individual on the pension or gratuity roll of an employer not conducting the principal part of its business in the United States shall be paid a pension under this section unless, in the judgment of the Board, he was, on March 1, 1937, carried on the pension or gratuity roll as a United States pensioner.

"(b) No individual covered by this section who was on July 1, 1937, eligible for an annuity under this Act or the Railroad Retirement Act of 1935, based in whole or in part on service rendered prior to January 1, 1937, shall receive a pension payment under this section subsequent to the payment due on October 1, 1937, or due on the 1st day of the month in which the application for an annuity of such individual has been awarded and certified by the Board, whichever of the two dates is earlier. The annuity claims of such individuals who receive pension payments under this section shall be adjudicated in the same manner and with the same effect as if no pension payments had been made: *Provided, however,* That no such individual shall be entitled to receive both a pension under this section and an annuity under this Act or the Railroad Retirement Act of 1935, and in the event pension payments have been made to any such individual in any month in which such individual is entitled to an annuity under this Act or the Railroad Retirement Act of 1935, the difference between the amounts paid as pensions and the amounts due as annuities shall be adjusted in accordance with such rules and regulations as the Board may deem just and reasonable.

"(c) The pension paid under this section shall not be considered to be in substitution for that part of the pension or gratuity from the employer which is in excess of a pension or gratuity at the rate of \$120 a month.

"Sec. 7. Nothing in this Act or the Railroad Retirement Act of 1935 shall be taken as restricting or discouraging payment by employers to retired employees of pensions or gratuities in addition to the annuities or pensions paid to such employees under such Acts, nor shall such Acts be taken as terminating any trust heretofore created for the payment of such pensions or gratuities.

"CONCLUSIVENESS OF RETURNS OF COMPENSATION AND OF FAILURE TO MAKE RETURNS OF COMPENSATION"

"Sec. 8. Employers shall file with the Board, in such manner and form and at such times as the Board by rules and regulations may prescribe, returns under oath of monthly compensation of employees; and, if the Board shall so require, shall furnish employees with statements of their monthly compensation as reported to the Board. Any such return shall be conclusive as to the amount of compensation earned by an employee during each month covered by the return, and the fact that no return was made of the compensation claimed to be earned by an employee during a particular calendar month shall be taken as conclusive that no compensation was earned by such employee during that month, unless the error in the amount of compensation returned in the one case, or the failure to make return of the compensation in the other case, is called to the attention of the Board within four years after the last date on which return of the compensation was required to be made.

"ERRONEOUS PAYMENTS"

"Sec. 9. (a) If the Board finds that at any time more or less than the correct amount of any annuity or pension has theretofore been paid to any individual under this Act or the Railroad Retirement Act of 1935, then, under regulations made by the Board, proper adjustments shall be made in connection with subsequent payments under such Acts to the same individual.

"(b) There shall be no recovery of payments of annuities, death benefits, or pensions from any person who, in the judgment of the Board, is without fault and if, in the judgment of the Board, such recovery would be against equity and good conscience. No disbursing officer shall be held liable for any amount paid by him to any person where the recovery of such amount is waived under this section.

"RETIREMENT BOARD"

"Personnel"

"Sec. 10. (a) There is hereby established as an independent agency in the executive branch of the Government a Railroad Retirement Board, to be composed of three members appointed by the President, by and with the advice and consent of the Senate. Each member shall hold office for a term of five years, except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of the term and the terms of office of the members first

taking office after the enactment date shall expire, as designated by the President, one at the end of two years, one at the end of three years, and one at the end of four years after the enactment date. One member shall be appointed from recommendations made by representatives of the employees and one member shall be appointed from recommendations made by representatives of carriers, in both cases as the President shall direct, so as to provide representation on the Board satisfactory to the largest number, respectively, of employees and carriers concerned. One member, who shall be the chairman of the Board, shall be appointed initially for a term of two years without recommendation by either carriers or employees and shall not be in the employment of or be pecuniarily or otherwise interested in any employer or organization of employees. Vacancies in the Board shall not impair the powers or affect the duties of the Board or of the remaining members of the Board, of whom a majority of those in office shall constitute a quorum, for the transaction of business. Each of said members shall receive a salary of \$10,000 per year, together with necessary traveling expenses and subsistence expenses, or per diem allowance in lieu thereof, while away from the principal office of the Board on official duties.

"Duties

"(b) 1. The Board shall have and exercise all the duties and powers necessary to administer this Act and the Railroad Retirement Act of 1935. The Board shall take such steps as may be necessary to enforce such Acts and make awards and certify payments. Decisions by the Board upon issues of law and fact relating to pensions, annuities, or death benefits shall not be subject to review by any other administrative or accounting officer, agent, or employee of the United States.

"2. If the Board finds that an applicant is entitled to an annuity under the provisions of this Act or the Railroad Retirement Act of 1935 then the Board shall make an award fixing the amount of the annuity and shall certify the payment thereof as hereinafter provided; otherwise the application shall be denied.

"3. The Board shall from time to time certify to the Secretary of the Treasury the name and address of each individual entitled to receive a payment, the amount of such payment, and the time at which it should be made, and the Secretary of the Treasury through the Division of Disbursements of the Treasury Department, and prior to audit by the General Accounting Office, shall make payment in accordance with the certification by the Board.

"4. The Board shall establish and promulgate rules and regulations to provide for the adjustment of all controversial matters arising in the administration of such Acts, with power as a Board or through any member or designated subordinate thereof, to require and compel the attendance of witnesses, administer oaths, take testimony, and make all necessary investigations in any matter involving annuities or other payments and shall maintain such offices, provide such equipment, furnishings, supplies, services, and facilities, and employ such individuals and provide for their compensation and expenses as may be necessary for the proper discharge of its functions. In the employment of such individuals under the civil service laws and rules the Board shall give preference over all others to individuals who have had experience in railroad service, if, in the judgment of the Board,

they possess the qualifications necessary for the proper discharge of the duties of the positions to which they are to be appointed. All rules, regulations, or decisions of the Board shall require the approval of at least two members except as provided in subdivision 5 of this subsection and they shall be entered upon the records of the Board, which shall be a public record. Notice of a decision of the Board, or of an employee thereof, shall be communicated to the applicant in writing within thirty days after such decision shall have been made. The Board shall gather, keep, compile, and publish in convenient form such records and data as may be necessary to assure proper administration of such Acts. The Board shall have power to require all employers and employees and any officer, board, commission, or other agency of the United States to furnish such information and records as shall be necessary for the administration of such Acts. The several district courts of the United States and the District Court of the United States for the District of Columbia shall have jurisdiction upon suit by the Board to compel obedience to any order of the Board issued pursuant to this section. The orders, writs, and processes of the District Court of the United States for the District of Columbia in such suits may run and be served anywhere in the United States. The Board shall make an annual report to the President of the United States to be submitted to Congress. Witnesses summoned before the Board shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

"5. The Board is authorized to delegate to any of its employees the power to make decisions on applications for annuities or death benefits in accordance with rules and regulations prescribed by the Board: *Provided, however,* That any person aggrieved by a decision so made shall have the right to appeal to the Board.

"COURT JURISDICTION

"SEC. 11. An employee or other person aggrieved may apply to the district court of any district wherein the Board may have established an office or to the District Court of the United States for the District of Columbia to compel the Board (1) to set aside an action or decision of the Board claimed to be in violation of a legal right of the applicant or (2) to take action or to make a decision necessary for the enforcement of a legal right of the applicant. Such court shall have jurisdiction to entertain such application and to grant appropriate relief. The decision of the Board with respect to an annuity, pension, or death benefit shall not be subject to review by any court unless suit is commenced within one year after the decision shall have been entered upon the records of the Board and communicated to the person claiming the annuity, pension, or death benefit. The jurisdiction herein specifically conferred upon the Federal courts shall not be held exclusive of any jurisdiction otherwise possessed by such courts to entertain actions at law or suits in equity in aid of the enforcement of rights or obligations arising under the provisions of this Act or the Railroad Retirement Act of 1935.

"EXEMPTION

"SEC. 12. No annuity or pension payment shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated.

"PENALTIES

"SEC. 13. Any officer or agent of an employer, as the word 'employer' is hereinbefore defined, or any employee acting in his own behalf, or any individual whether or not of the character hereinbefore defined, who shall willfully fail or refuse to make any report or furnish any information required, in accordance with the provisions of section 10 (b), 4, by the Board in the administration of this Act or the Railroad Retirement Act of 1935, or who shall knowingly make or cause to be made any false or fraudulent statement or report when a statement or report is required to be made for the purpose of such Acts, or who shall knowingly make or aid in making any false or fraudulent statement or claim for the purpose of causing an award or payment under such Acts, shall be punished by a fine of not more than \$10,000 or by imprisonment not exceeding one year.

"SEPARABILITY

"SEC. 14. If any provision of this Act or the Railroad Retirement Act of 1935, or the application thereof to any person or circumstance, should be held invalid, the remainder of such Act, or the application of such provision to other persons or circumstances, shall not be affected thereby.

"RAILROAD RETIREMENT ACCOUNT

"SEC. 15. (a) There is hereby created an account in the Treasury of the United States to be known as the Railroad Retirement Account. There is hereby authorized to be appropriated to the account for each fiscal year, beginning with the fiscal year ending June 30, 1937, as an annual premium an amount sufficient, with a reasonable margin for contingencies, to provide for the payment of all annuities, pensions, and death benefits in accordance with the provisions of this Act and the Railroad Retirement Act of 1935. Such amount shall be based on such tables of mortality as the Railroad Retirement Board shall from time to time adopt, and on an interest rate of 3 per centum per annum compounded annually. The Railroad Retirement Board shall submit annually to the Bureau of the Budget an estimate of the appropriation to be made to the account.

"(b) At the request and direction of the Board, it shall be the duty of the Secretary of the Treasury to invest such portion of the amounts credited to the account as, in the judgment of the Board, is not immediately required for the payment of annuities, pensions, and death benefits in accordance with the provisions of this Act and the Railroad Retirement Act of 1935 in interest-bearing obligations of the United States or in obligations guaranteed as to both principal and interest by the United States. For such purpose such obligations may be acquired on original issue at par or by purchase of outstanding obligations at the market price. The purposes for which obligations of the United States may be issued under the Second Liberty Bond Act, as amended, are hereby extended to authorize the issuance at par of special obligations exclusively to the account. Such special obligations shall bear interest at the rate of 3 per centum per annum. Obligations other than such special obligations

may be acquired for the account only on such terms as to provide an investment yield of not less than 3 per centum per annum. It shall be the duty of the Secretary of the Treasury to sell and dispose of obligations in the account if it shall be in the interest of the account so to do. Any obligations acquired by the account, except special obligations issued exclusively to the account, may be sold at the market price. Special obligations issued exclusively to the account shall, at the request of the Board, be redeemed at par plus accrued interest. All amounts credited to the account shall be available for the payment of all annuities, pensions, and death benefits in accordance with the provisions of this Act and the Railroad Retirement Act of 1935.

"(c) The Board is hereby authorized and directed to select two actuaries, one from recommendations made by representatives of employees and the other from recommendations made by representatives of carriers. These actuaries, along with a third who shall be designated by the Secretary of the Treasury, shall be known as the Actuarial Advisory Committee with respect to the Railroad Retirement Account. The committee shall examine the actuarial reports and estimates made by the Railroad Retirement Board and shall have authority to recommend to the Board such changes in actuarial methods as they may deem necessary. The compensation of the members of the committee of actuaries, exclusive of the member designated by the Secretary, shall be fixed by the Board on a per-diem basis.

"(d) The Board shall include in its annual report a statement of the status and the operations of the Railroad Retirement Account. At intervals not longer than three years the Board shall make an estimate of the liabilities created by this Act and the Railroad Retirement Act of 1935 and shall include such estimate in its annual report. Such report shall also contain an estimate of the reduction in liabilities under Title II of the Social Security Act arising as a result of the maintenance of this Act and the Railroad Retirement Act of 1935.

"APPROPRIATION FOR ADMINISTRATIVE EXPENSES

"SEC. 16. There is hereby authorized to be appropriated from time to time such sums as may be necessary to provide for the expenses of the Board in administering the provisions of this Act and the Railroad Retirement Act of 1935.

"SOCIAL SECURITY ACT

"SEC. 17. The term 'employment', as defined in subsection (b) of section 210 of title II of the Social Security Act, shall not include service performed by an individual as an employee as defined in section 1 (b).

"FREE TRANSPORTATION

"SEC. 18. It shall not be unlawful for carriers by railroad subject to this Act to furnish free transportation to individuals receiving annuities or pensions under this Act or the Railroad Retirement Act of 1935 in the same manner as such transportation is furnished to employees in their service."

PART II

SEC. 201. The Act entitled "An Act to establish a retirement system for employees of carriers subject to the Interstate Commerce Act, and for other purposes", approved August 29, 1935, as in force prior to its amendment by part I of this Act, may be cited as the "Railroad Retirement Act of 1935"; and such Act, as amended by part I of this Act, may be cited as the "Railroad Retirement Act of 1937".

SEC. 202. The claims of individuals (and the claims of spouses and next of kin of such individuals) who, prior to the date of the enactment of this Act, relinquished all rights to return to the service of a carrier as defined in the Railroad Retirement Act of 1935 or ceased to be employee representatives as defined therein, and became eligible for annuities under such Act, shall be adjudicated by the Board in the same manner and with the same effect as if this Act had not been enacted: *Provided, however,* That with respect to any such claims no reduction shall be made in any annuity certified after the date of the enactment of this Act because of continuance in service after age sixty-five: *And provided further,* That service rendered prior to August 29, 1935, to a company which on that date was a carrier as defined in the Railroad Retirement Act of 1935, shall be included in the service period in connection with any annuity certified in whole or in part by the Board after the date of the enactment of this Act, irrespective of whether at the time such service was rendered such company was a carrier as defined in the Railroad Retirement Act of 1935; and service rendered prior to August 29, 1935, to any express company, sleeping-car company, or carrier by railroad which was a predecessor of a company which on that date was a carrier as defined in the Railroad Retirement Act of 1935, shall also be included in the service period in connection with any annuity certified in whole or in part by the Board after the date of the enactment of this Act, irrespective of whether at the time such service was rendered such predecessor was a carrier as defined in the Railroad Retirement Act of 1935: *And provided further,* That annuity payments due an individual under the Railroad Retirement Act of 1935 but not yet paid at death shall be paid to a surviving spouse if such spouse is entitled to an annuity under an election made pursuant to the provisions of section 5 of such Act; otherwise they shall be paid to such person or persons as the deceased may have designated by a writing filed with the Board prior to his death, or if there be no designation, to the legal representative of the deceased.

SEC. 203. Any individual who, prior to the date of the enactment of this Act, relinquished all rights to return to the service of a carrier as defined in the Railroad Retirement Act of 1935 or ceased to be an employee representative as defined in such Act, and who is not eligible for an annuity under that Act but who would have been eligible for an annuity under the Railroad Retirement Act of 1937 had such Act been in force from and after August 29, 1935, shall have his right to an annuity adjudicated under the Railroad Retirement Act of 1937: *Provided, however,* That no such annuity shall begin prior to the date of the enactment of this Act.

¹ So in original.

SEC. 204. The Railroad Retirement Act of 1935 shall continue in force and effect with respect to the rights of individuals granted annuities prior to the date of the enactment of this Act.

SEC. 205. The enactment of this Act shall have no effect on the status, tenure of office, or compensation of the present members, officers, and employees of the Railroad Retirement Board; except that individuals who have had experience in railroad service shall be retained in the employ of the Board, whether or not qualified under the civil service laws and rules, if in the judgment of the Board they possess the qualifications necessary for the proper discharge of the duties of the positions which they are holding.

Approved, June 24, 1937.

[PUBLIC—No. 174—75TH CONGRESS]

[CHAPTER 405—1ST SESSION]

[H. R. 7589]

AN ACT

To levy an excise tax upon carriers and certain other employers and an income tax upon their employees, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

DEFINITIONS

SECTION 1. That as used in this Act—

(a) The term "employer" means any carrier (as defined in subsection (i) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer: *Provided, however,* That the term "employer" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Commissioner of Internal Revenue, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "employer" shall also include railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services in connection with or incidental to railroad transportation; and railway labor organizations, national in scope, which have been or may be organized in accordance with the provisions of the Railway Labor Act, as amended, and their State and National legislative committees and their general committees and their insurance departments and their local lodges and divisions, established pursuant to the constitution and bylaws of such organizations.

(b) The term "employee" means any person in the service of one or more employers for compensation: *Provided, however,* That the

term "employee" shall include an employee of a local lodge or division defined as an employer in subsection (a) only if he was in the service of or in the employment relation to a carrier on or after August 29, 1935. An individual is in the employment relation to a carrier if he is on furlough, subject to call for service within or outside the United States and ready and willing to serve, or on leave of absence, or absent on account of sickness or disability; all in accordance with the established rules and practices in effect on the carrier: *Provided further*, That an individual shall not be deemed to have been on August 29, 1935, in the employment relation to a carrier not conducting the principal part of its business in the United States unless during the last pay-roll period in which he rendered service to it prior to said date, he rendered service to it in the United States.

(c) The term "employee representative" means any officer or official representative of a railway labor organization other than a labor organization included in the term "employer" as defined in section 1 (a), who before or after the enactment hereof was in the service of an employer as defined in section 1 (a) and who is duly authorized and designated to represent employees in accordance with the Railway Labor Act, as amended, and any individual who is regularly assigned to or regularly employed by such officer or official representative in connection with the duties of his office.

(d) An individual is in the service of an employer whether his service is rendered within or without the United States if he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, which service he renders for compensation: *Provided, however*, That an individual shall be deemed to be in the service of an employer not conducting the principal part of its business in the United States only when he is rendering service to it in the United States.

(e) The term "compensation" means any form of money remuneration earned by an individual for services rendered as an employee to one or more employers, or as an employee representative, including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost. Such term does not include tips, or the voluntary payment by an employer, without deduction from the remuneration of the employee, of the tax imposed on such employee by section 2 of this Act. Compensation which is earned during the period for which the Commissioner of Internal Revenue shall require a return of taxes hereunder to be made and which is payable during the calendar month following such period shall be deemed to have been paid during such period only.

(f) The term "United States" when used in a geographical sense means the States, Alaska, Hawaii, and the District of Columbia.

(g) The term "company" includes corporations, associations, and joint-stock companies.

(h) The term "employee" includes an officer of an employer.

(i) The term "carrier" means an express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act.

(j) The term "person" means an individual, a partnership, an association, a joint-stock company, or a corporation.

INCOME TAX ON EMPLOYEES

SEC. 2. (a) In addition to other taxes, there shall be levied, collected, and paid upon the income of every employee a tax equal to the following percentages of so much of the compensation of such employee as is not in excess of \$300 for any calendar month, earned by him after December 31, 1936—

1. With respect to compensation earned during the calendar years 1937, 1938, and 1939, the rate shall be $2\frac{3}{4}$ per centum;

2. With respect to compensation earned during the calendar years 1940, 1941, and 1942, the rate shall be 3 per centum;

3. With respect to compensation earned during the calendar years 1943, 1944, and 1945, the rate shall be $3\frac{1}{4}$ per centum;

4. With respect to compensation earned during the calendar years 1946, 1947, and 1948, the rate shall be $3\frac{1}{2}$ per centum;

5. With respect to compensation earned after December 31, 1948, the rate shall be $3\frac{3}{4}$ per centum;

(b) The tax imposed by this section shall be collected by the employer of the taxpayer by deducting the amount of the tax from the compensation of the employee as and when paid. If an employee is paid compensation by more than one employer with respect to any calendar month, then, under regulations made under this Act, the Commissioner of Internal Revenue may prescribe the proportion of the tax to be deducted by each employer from the compensation paid by him to the employee with respect to such month. Every employer required under this subsection to deduct the tax is hereby made liable for the payment of such tax and shall not be liable to any person for the amount of any such payment.

(c) If more or less than the correct amount of tax imposed by this section is paid with respect to any compensation payment, then, under regulations made under this Act by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, proper adjustments, with respect both to the tax and the amount to be deducted, shall be made, without interest, in connection with subsequent compensation payments to the same employee by the same employer.

EXCISE TAX ON EMPLOYERS

SEC. 3. (a) In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of so much of the compensation as is not in excess of \$300 for any calendar month paid by him to any employee for services rendered to him after December 31, 1936: *Provided, however,* That if an employee is paid compensation by more than one employer with respect to any such calendar month, the tax imposed by this section shall apply to not more than \$300 of the aggregate compensation paid to said employee by all said employers with respect to such calendar month, and each such employer shall be liable for that proportion of the tax with respect to such compensation which his payment to the employee with respect to such calendar month bears to the aggregate compensation paid to such employee by all employers with respect to such calendar month:

1. With respect to compensation paid to employees for services rendered during the calendar years 1937, 1938, and 1939, the rate shall be $2\frac{3}{4}$ per centum;

2. With respect to compensation paid to employees for services rendered during the calendar years 1940, 1941, and 1942, the rate shall be 3 per centum;

3. With respect to compensation paid to employees for services rendered during the calendar years 1943, 1944, and 1945, the rate shall be $3\frac{1}{4}$ per centum;

4. With respect to compensation paid to employees for services rendered during the calendar years 1946, 1947, and 1948, the rate shall be $3\frac{1}{2}$ per centum;

5. With respect to compensation paid to employees for services rendered after December 31, 1948, the rate shall be $3\frac{3}{4}$ per centum.

(b) If more or less than the correct amount of the tax imposed by this section is paid with respect to any compensation payment, then, under regulations made by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, proper adjustments with respect to the tax shall be made, without interest, in connection with subsequent excise-tax payments made by the same employer.

REFUNDS AND DEFICIENCIES

SEC. 4. If more or less than the correct amount of the tax imposed by section 2 (a) or 3 (a) of this Act is paid or deducted with respect to any compensation payment and the overpayment or underpayment of the tax cannot be adjusted under section 2 (c) or 3 (b), the amount of the overpayment shall be refunded, or the amount of the underpayment shall be collected in such manner and at such times (subject to the statute of limitations properly applicable thereto) as may be prescribed by regulations under this Act as made by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury.

INCOME TAX ON EMPLOYEE REPRESENTATIVES

SEC. 5. In addition to other taxes, there shall be levied, collected, and paid upon the income of each employee representative a tax equal to the following percentages of so much of the compensation of such employee representative as is not in excess of \$300 for any calendar month, earned by him after December 31, 1936:

1. With respect to compensation earned during the calendar years 1937, 1938, and 1939, the rate shall be $5\frac{1}{2}$ per centum;

2. With respect to compensation earned during the calendar years 1940, 1941, and 1942, the rate shall be 6 per centum;

3. With respect to compensation earned during the calendar years 1943, 1944, and 1945, the rate shall be $6\frac{1}{2}$ per centum;

4. With respect to compensation earned during the calendar years 1946, 1947, and 1948, the rate shall be 7 per centum;

5. With respect to compensation earned after December 31, 1948, the rate shall be $7\frac{1}{2}$ per centum.

The compensation of an employee representative for the purpose of ascertaining the tax thereon shall be determined in the same manner and with the same effect as if the employee organization by which such employee representative is employed were an employer as defined in section 1 (a) of this Act.

DEDUCTIBILITY FROM INCOME TAX

SEC. 6. For the purposes of the income tax imposed by title I of the Revenue Act of 1936 or by any Act of Congress in substitution therefor, the taxes imposed by sections 2 and 5 of this Act shall not be allowed as a deduction to the taxpayer in computing his net income.

- COLLECTION AND PAYMENT OF TAXES

SEC. 7. (a) The taxes imposed by this Act shall be collected by the Bureau of Internal Revenue and shall be paid into the Treasury of the United States as internal-revenue collections.

(b) The taxes imposed by this Act shall be collected and paid quarterly or at such other times and in such manner and under such conditions not inconsistent with this Act as may be prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. If a tax imposed by this Act is not paid when due, there shall be added as part of the tax (except in the case of adjustments made in accordance with the provisions of this Act) interest at the rate of 6 per centum per annum from the date the tax became due until paid.

(c) All provisions of law, including penalties, applicable with respect to any tax imposed by section 600 or section 800 of the Revenue Act of 1926, and the provisions of section 607 of the Revenue Act of 1934, insofar as applicable and not inconsistent with the provisions of this Act, shall be applicable with respect to the taxes imposed by this Act.

(d) In the payment of any tax under this Act, a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to 1 cent.

(e) Any tax paid under this Act by a taxpayer with respect to any period with respect to which he is not liable to tax under this Act shall be credited against the tax, if any, imposed by title VIII of the Social Security Act upon such taxpayer, and the balance, if any, shall be refunded. Any tax paid under title VIII of the Social Security Act by a taxpayer with respect to any period with respect to which he is not liable to tax under such title VIII shall be credited against the tax, if any, imposed by this Act upon such taxpayer, and the balance, if any, shall be refunded.

COURT JURISDICTION

SEC. 8. The several district courts of the United States and the District Court of the United States for the District of Columbia, respectively, shall have jurisdiction to entertain an application by the Attorney General on behalf of the Commissioner of Internal Revenue to compel an employee or other person residing within the jurisdiction of the court or an employer subject to service of process within its jurisdiction to comply with any obligations imposed on such employee, employer, or other person under the provisions of this Act. The jurisdiction herein specifically conferred upon such Federal courts shall not be held exclusive of any jurisdiction otherwise possessed by such courts to entertain actions at law or suits in equity in aid of the enforcement of rights or obligations arising under the provisions of this Act.

SOCIAL SECURITY ACT

SEC. 9. (a) The term "employment", as defined in subsection (b) of section 811 of title VIII of the Social Security Act, shall not include service performed by an individual as an employee as defined in section 1 (b) or service performed as an employee representative as defined in section 1 (c).

(b) The Secretary of the Treasury at intervals of not longer than three years shall estimate the reduction in the amount of taxes collected under title VIII of the Social Security Act by reason of the operation of subsection (a) of this section and shall include such estimate in his annual report.

SEPARABILITY

SEC. 10. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

REPEAL OF PRIOR TAX ACT

SEC. 11. The provisions of this Act are in substitution for the provisions of the Act of August 29, 1935, as amended, entitled "An Act to levy an excise tax upon carriers and an income tax upon their employees, and for other purposes", which is hereby repealed. All moneys payable as and for taxes under such Act of August 29, 1935, and not heretofore paid shall cease to be payable and all proceedings pending for the recovery of any such moneys shall be terminated. All sums paid into the Treasury of the United States as and for taxes under such Act shall be refunded, except so much of the sums so paid as and for taxes with respect to compensation earned after December 31, 1936, as equals the taxes imposed by this Act with respect to the same persons and the same period, and the sums not required to be so refunded shall be retained in the Treasury of the United States and credited on taxes due and payable under this Act. All sums deducted by employers from the compensation of employees as and for taxes under such Act of August 29, 1935, which have not been paid into the Treasury of the United States shall be repaid by such employers to such employees, except so much of the sums so deducted as and for taxes in respect of compensation earned after December 31, 1936, as equals the taxes imposed and required to be deducted by this Act with respect to the same persons and the same period, and the sums not required to be so repaid shall be paid into the Treasury of the United States and thereupon shall be credited on taxes due and payable under this Act. No interest shall be allowed or paid with respect to any sum refunded, credited, or repaid under the provisions of this section.

RULES AND REGULATIONS

SEC. 12. The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make and publish such rules and regulations as may be necessary for the enforcement of this Act.

SHORT TITLE

SEC. 13. This Act may be cited as the "Carriers Taxing Act of 1937".

Approved, June 29, 1937.

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MR. JUSTICE BRANDEIS delivered the opinion of the Court.

California owns the railroad along the San Francisco water front known as State Belt Railroad, and operates it in interstate commerce. *Sherman v. United States*, 282 U. S. 25; *United States v. California*, 297 U. S. 175. On leave granted, the State filed in this Court this bill against the members of the Railroad Retirement Board and the Commissioner of Internal Revenue, individually and in their official capacities, to enjoin them from enforcing against that railroad provisions of the Acts of Congress known as the Railroad Retirement Acts of 1935 and 1937¹ and of the Carriers Taxing Act of 1937.²

The bill recites that California has a State Employees' Retirement system sustained by a fund to which the State and its employees contribute; and that all the persons employed in the operation of State Belt Railroad are members of that retirement system and are entitled to pensions thereunder, unless they are members of a retirement system supported wholly, or in part, by funds of the United States; that the three Acts of Congress named have for their sole purpose the establishment of a pension system of annuities and other benefits for employees of interstate railroads; and that the federal system is sustained by taxes imposed by the Carriers Taxing Act. The bill asserts, apparently, that as a matter of statutory construction, the federal system is not applicable to the employees of State Belt Railroad; and apparently that if construed as applicable to them, the legislation is unconstitutional. The bill charges that the Railroad Retirement Board has threatened to require the complainant to gather and keep records concerning the

¹ Act of August 29, 1935, c. 812, 49 Stat. 967, as amended June 24, 1937, c. 382, Part I, 50 Stat. 307, 45 U. S. C., § 228a-r (1937 Supp.).

² Act of June 29, 1937, c. 405, 50 Stat. 435, 45 U. S. C., §§ 261-73 (1937 Supp.).

employees of the State Belt Railroad, which would subject it "to great expense"; and that the Board "will enforce against the complainant, its officers, agents, and employees certain penalties if it refuses" to do so. The bill charges, also, that the Commissioner of Internal Revenue has threatened "to enforce taxes, under the Carriers Taxing Act, and will subject it to heavy fines and penalties if it fails to pay the same. The relief prayed is that the three Acts of Congress be declared inapplicable to State Belt Railroad; that the members of the Railroad Retirement Board be enjoined, among other things, from requiring the railroad to assemble and furnish the information requested; and that the Commissioner of Internal Revenue be enjoined from enforcing collection of the taxes claimed.

The defendants moved to dismiss the bill, assigning therefor nine grounds. We need consider only the objection that the bill is without equity.^a For we are of opin-

^aThis objection was the basis of two of the reasons given in support of the motion to dismiss. The other seven are: (1) The individual citizenship of defendants can form no basis for the original jurisdiction of the Court. The defendants can and will act only as officials of the United States; and as officials they are citizens of no state. (2) The Collector of Internal Revenue for the First District of California and the employees of the State Belt Railroad have not been joined as defendants. They are indispensable parties in whose absence the Court should not proceed. (3) The cause is not maintainable in this Court, since the Collector of Internal Revenue for the First District of California, a citizen of California, should be made a party, and to join him would deprive the Court of original jurisdiction. (4) The cause is not maintainable in this Court, since the employees of the State Belt Railroad, citizens of California, should be made parties, and to join any of them would deprive the Court of original jurisdiction. (5) Maintenance of the suit is prohibited by Section 3224 of the Revised Statutes. (6) The United States is the real party in interest and hence an indispensable party. (7) The issues presented by complainant have been clearly decided against it by previous decisions of this Court, and a re-examination of those contentions would serve no useful purpose.

ion that there was adequate opportunity to test at law the applicability and constitutionality of the Acts of Congress; and that no danger is shown of irreparable injury if that course is pursued.

First. The alleged threat of the Railroad Retirement Board to require State Belt Railroad to gather and keep records of its employees does not expose it to irreparable injury. The Railroad Retirement Act of 1937 provides:

"Sec. 8. Employers shall file with the Board, in such manner and form and at such times as the Board by rules and regulations may prescribe, returns under oath of monthly compensation of employees, and, if the Board shall so require, shall furnish employees with statements of their monthly compensation as reported to the Board. . . .

"Sec. 10 (b) 4. . . . The Board shall have power to require all employers and employees and any officer, board, commission, or other agency of the United States to furnish such information and records as shall be necessary for the administration of such Acts. The several district courts of the United States and the District Court of the United States for the District of Columbia shall have jurisdiction upon suit by the Board to compel obedience to any order of the Board issued pursuant to this section"

"Sec. 13. Any officer or agent of an employer . . . who shall willfully fail or refuse to make any report or furnish any information required, in accordance with the provisions of section 10 (b) 4, by the Board . . . shall be punished by a fine of not more than \$10,000 or by imprisonment not exceeding one year."

The only "threats" made against the complainant in connection with these sections is a ruling by the Railroad Retirement Board that the State Belt Railroad is subject to the Railroad Retirement Acts. No specific action in relation to that railroad appears to have been taken

by the Board.⁴ Regulations have been prescribed under §§ 8 and 10 which are simple and of a type which can be complied with largely by transcriptions from payrolls.⁵ The bill alleges that compliance with the regulations would subject the State "to great expense." No supporting detail or specification is given. Such a general statement is not an adequate basis for relief on the ground of irreparable damages.⁶ The trifling expense of temporarily complying with the regulation until the applicability of the Act shall have been judicially determined, like the expense of the administrative hearings complained of in *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50, 51, and *Petroleum Exploration, Inc. v. Public Service Comm'n*, 304 U. S. 209, 220, 221, is not sufficient to support the claim of irreparable injury indispensable to interposition by injunction. Compare *Spielman Motor Sales Co. v. Dodge*, 295 U. S. 89, 95, 96.

Moreover, the Board is without power to enforce its regulations except by resort to legal proceedings, as provided in § 10 (b) 4; and in any suit which it may institute to enforce the regulations⁷ ample opportunity is afforded to defend, on the ground that State Belt Railroad is not subject to the Railroad Retirement Acts. It is contended

⁴ Compare *Dalton Adding Machine Co. v. State Corporation Comm'n*, 236 U. S. 699, 701; *Continental Baking Co. v. Woodring*, 286 U. S. 352, 367-68; *State Corporation Comm'n v. Wichita Gas Co.*, 290 U. S. 561, 568-69.

⁵ 3 Federal Register, p. 22 *et seq.* (promulgated December 31, 1937), 3 Federal Register, p. 218 (promulgated January 17, 1938), in effect at the time leave to file the bill of complaint was granted, May 16, 1938, later superseded by 3 Federal Register, pp. 1478, 1493 *et seq.*, Part 50 (promulgated May 31, 1938).

⁶ Compare *Shelton v. Platt*, 139 U. S. 591, 596; *Cruickshank v. Bidwell*, 176 U. S. 73, 81; *Indiana Mfg. Co. v. Koehne*, 188 U. S. 681, 690; *Boise Artesian Water Co. v. Boise City*, 213 U. S. 276, 285.

⁷ Compare *Cavanaugh v. Looney*, 248 U. S. 453; *Fenner v. Boykin*, 271 U. S. 240; *Hurley v. Kincaid*, 285 U. S. 95.

that the possible penalty, in case of a prosecution under § 13, is so serious as to prevent the opportunity to defend from being an adequate remedy. Compare *Ex parte Young*, 209 U. S. 123, 165. No prosecution has been instituted or threatened. And authority to institute such a proceeding rests not with the Railroad Retirement Board, but with the United States Attorney for the Northern District of California, who is not made defendant in this suit.⁸ Furthermore, it may be doubted whether a refusal to comply with the regulation would be deemed willful, if based on an honest belief that the Act is not applicable to a railroad operated by the State. Compare *United States v. Murdock*, 290 U. S. 389, 394-396.

Second. The alleged threat of the Commissioner of Internal Revenue to require payment of the tax does not show danger of irreparable injury. The only threat alleged is the ruling that the Carriers Taxing Act is applicable to this railroad—a ruling made in answer to an enquiry by the Attorney General of the State. The tax for the year is \$7,862.32 payable by the State Belt Railroad; and an equal amount payable by the employees to be deducted by it from their compensation. Payment of the tax would not expose the State to irreparable injury,⁹ since the amount paid with interest could be recovered if not due. Payment followed by proceedings to recover the amount would involve some delay, as an action at law to recover the sum paid could not be instituted until six months after making the claim for refund, if the Commissioner should fail to act earlier upon it.¹⁰ Such possible delay, it is urged, is a special circumstance which justifies resort to a suit for an injunction in order that the ques-

⁸ Compare *Federal Trade Comm'n v. Claire Furnace Co.*, 274 U. S. 160, 173-74; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 620-22.

⁹ *Dows v. Chicago*, 11 Wall. 108. See also cases in Note 6.

¹⁰ R. S. § 3226, as amended by § 1903, Revenue Act of 1932.

tion of liability may be promptly determined. If the delay incident to such proceedings justified refusal to pay a tax, the federal rule that a suit in equity will not lie to restrain collection on the sole ground that the tax is illegal,¹¹ could have little application. For possible delay of that character is the common incident of practically every contest over the validity of a federal tax.

It is urged that in order to raise the money with which to pay the State's portion of the tax, it would be necessary to readjust the tariffs of State Belt Railroad; and that the deduction of the employees' portion from the payroll would result in a multiplicity of suits by employees to recover the amounts and to reestablish their rights and privileges under the laws of the State. The meagre statements of the bill do not convince us that the apprehension alleged is well founded. The State Employees Retirement Act also requires the State Belt Railroad to make deductions from the salaries of its employees. The bill does not show the precise relationship between the amounts required to be deducted by the state and federal acts, or even, if the amount of the federal deduction is greater, that it is impossible for the State Belt Railroad to work out with its employees a way of adjusting its affairs during the period of uncertainty as to which act is applicable. Mere inconvenience to the taxpayer in raising the money with which to pay taxes is not uncommon, and is not a special circumstance which entitles one to resort to a suit for an injunction in order to test the validity or applicability of the tax. For aught that appears prompt payment of the tax and claim of refund would have led to an early determination of the liability here contested.

Bill dismissed.

¹¹ See cases under Note 6.